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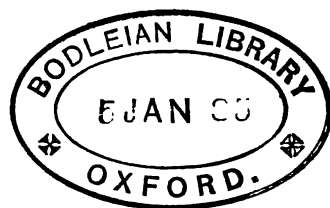
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A  
CONCISE TREATISE  
ON THE LAW OF  
MARRIAGE SETTLEMENTS  
WITH AN  
APPENDIX OF STATUTES.

BY  
HENRY THOMAS BANNING, M.A.,  
BARRISTER-AT-LAW.

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## PREFACE.

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THE rapid increase of case-law on questions relating to the construction and preparation of Marriage Settlements, and the length of time that has elapsed since the issue of any work dealing specially with the subject, will, it is hoped, afford a sufficient excuse for the appearance of this volume.

It has been the aim of the Author in this work to treat the subject with the greatest conciseness which is compatible with freedom from obscurity.

The references to cases are brought up to the most recent date, and are given, for the most part, to all contemporaneous Reports.

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*October, 1884.*



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# THE LAW OF MARRIAGE SETTLEMENTS.

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## CHAPTER I.

### THE MARRIAGE CONSIDERATION.

THE marriage contract is of the highest civil importance among all civilized nations as affecting the *status* and position of those who enter upon it. This importance is fully recognized by the law of England; and to incur the obligations which marriage imposes is recognized as being equivalent to giving a valuable consideration for any engagement which may be entered into upon the faith of the marriage. In fact, the consideration of marriage is not unfrequently characterised by English lawyers as being the most valuable consideration. Marriage a valuable consideration.

It is almost unnecessary to state that the performance of the contract to marry cannot itself be specifically enforced (*a*), though there at present exists a well-known remedy by action for damages for a breach of promise of marriage.

Marriage being thus deemed to be a valuable consideration (*b*), it follows that settlements and agreements for settlements made in contemplation and consideration of marriage are of binding validity upon the settlors or intending settlors, although no other consideration may How far consideration extends.

(*a*) *Smith v. Smith*, 3 Atk. 307.

(*b*) Authority for this proposition is almost unnecessary. See, how-

ever, *Fraser v. Thompson*, 4 De G. & J. 661.

exist. This being clear, difficulty nevertheless has often been felt as to how far parties in favour of whom some benefit is reserved by the settlement have a right to insist upon it by being—to use a common though not very accurate mode of expression—“within the consideration of the settlement.”

On this head no doubt has ever existed as to the validity of the claim of the husband and the wife and the issue of the marriage; but doubts have frequently been entertained how far further limitations in favour of collateral relations or strangers may not be merely voluntary, and consequently not enforceable.

Notwithstanding much conflict of opinion, this question seems one which may now be answered for the future on the authority of recent decisions with tolerable certainty and in accordance with a reasonable principle (c).

Old theory.

Much of the old difficulty on the question arose from the existence of an opinion that persons to be “within the consideration” of a settlement, so as not to be only volunteers under it, ought to be persons from whom (or from whose predecessors in title) some part of the consideration moved. This, it is submitted, is not the true principle of distinction between voluntary and non-voluntary claims. The principle is rather whether the interest of the persons claiming was contracted for by some person from whom some valuable consideration moved, in which case such interest will be considered as founded upon a valuable consideration, though no part of the consideration moved from the claimants to such interest, or those from whom they derive their claim. This principle seems consistent with

True theory.

(c) See on the subject *Gale v. Gale*, L. R., 6 C. D. 144; 41 L. J., Ch. 809; 36 L. T. 690; 25 W. R. 772; *Navin v. Prowse*, 6 Ves. 752, 758; *Dilkes v. Broadmead*, 7 Jur. (N. S.) 56; *Newstead v. Searles*, 1 Atk. 265; *Clayton v. Wilton*, 3

Mad. 302; *Clarke v. Wright*, 6 H. & N. 849; *Johnson v. Legard*, 6 Maule & Sel. 60; *Kekewich v. Manning*, 1 De G., M. & G. 176, 202, 203; and *Dart*, V. & P. 5th ed. pp. 893 *et seq.*

law, as it seems clear that it is competent for A. to contract with B. in return for a consideration passing from A. to B. for a benefit to C., although C. give no consideration, and that such a contract as against B. will be founded on valuable consideration whatever may be the rights *inter se* of A. and C. It follows from this principle that in the consideration of each case the question to be decided is whether the interest of the person claiming was or not in fact contracted for by a person giving consideration, that is to say, on a marriage by either the husband or wife, or possibly by other persons who join in the settlement. In this view the principal difference between the rights of the husband and wife and the children of the marriage on the one side, and those of collateral relations or even strangers on the other side, will be that as to the husband and wife and children it may be assumed that interests acquired by them under the settlement were intended to be contracted for, while as to collaterals or strangers claiming under a settlement the *onus* of proof may be upon them to show that their interests were intended to be stipulated for. This, it is believed, is the true theory of decision in these cases, as on the whole deducible from the later decisions and *dicta* on the subject.

In *Clayton v. Earl of Wilton* (d) limitations in a marriage settlement in favour of the issue of a second marriage of the settlor were held good even against a purchaser for value. This was so held on a case sent from Chancery to the King's Bench, and (as usual in such cases) the reasons for the decision, which seems rather in advance of the then current of decision, are not given in the certificate of the judges.

But with that exception in most of the early cases limitations over to collaterals were taken apparently to be necessarily voluntary. Thus, in *Johnson v. Legard* (e), it

(d) 3 Mad. 302. See 6 Maule & Sel. 60.  
Sel. 67, n.

was held that a limitation to the brothers of the settlor was not good against a subsequent conveyance for value, although it was suggested that inasmuch as the brothers, in the circumstances of the case, were entitled to portions, and were, in a manner, incumbrancers on the estate, the wife might have stipulated for the limitation in their favour, so as to clear the estate from which she was entitled to a jointure.

In *Stackpoole v. Stackpoole* (*f*), a case in which a limitation to the brothers of the settlor was held voluntary, there is the high authority of Lord St. Leonards for saying that it was clear that limitations to collateral relations of the settlor did not fall within the consideration of the marriage, and that such was the settled law. So, also, in another case, where the wife's property was limited to the brothers and sisters of the wife, the limitation was, not without hesitation, held to be voluntary (*g*).

Modern  
theory.

It is probable that these, and many similar cases, were correctly decided in each case upon the facts, yet the grounds for the decisions are, it is submitted, generally too broadly given, and, it appears probable, that the court would now decide, as above suggested, upon a rather different principle; the modern principle would seem to be that limitations to collaterals as a class would be assumed to be voluntary, not from any necessity of the case, but from the unlikelihood that the settlor intended to contract in their behalf; and for some of the reasons suggested in *Paul v. Paul* (*h*), namely, that the members of the class were probably unknown to the settlor, and that the class was one for which, consequently, the settlor could hardly have any regard or affection, and that, accordingly, their

*Paul v. Paul.*

(*f*) 4 Dr. & War. 320, following *Johnson v. Legard*, 3 Mad. 283.

(*g*) *Cotterell v. Horner*, 13 Sim. 506. In this case, liberty to send a case for decision at law was allowed, but not taken advantage

of. And see *Smith v. Cherrill*, L. R., 4 Eq. 390; 15 W. R. 919; 16 L. T. 517.

(*h*) L. R., 15 C. D. 580; 50 L. J., Ch. 14; 43 L. T. 239; 29 W. R. 281.

advantage could not reasonably be supposed to have been contracted for (*i*).

Further, even in an early case (*k*), where the husband was, by reason of the death of his wife and children, left the only person interested in certain funds settled by his own relations, it was held that his interest was founded on valuable consideration, on the ground that every provision with regard to husband and wife falls directly within the marriage consideration, and the wife is interested in the provision for the husband as well as in that for herself; and that the marriage is consented to in consideration not only of her interest in the event of survivorship but of the husband's income and the provision he is, therefore, enabled to make for her and her children during his life; and that when the provision is once made one for valuable consideration by the marriage no event afterwards can alter it.

Marriage a consideration for all purposes.

There seems always to have been an exception to the strictness of the old rule with regard to the children of a prior marriage in the event of a second marriage. In an early case (*l*) a settlement made by a widow of her own property in favour of children of a former marriage on her second marriage was held to be for valuable consideration and good against a subsequent mortgagee.

Children of a prior marriage favoured.

So a limitation in favour of children of a subsequent marriage has been held good (*m*).

And a limitation in favour of an existing illegitimate child in the marriage settlement of the mother was held valid against subsequent mortgagees of the husband and wife (*n*).

In *Gale v. Gale* (*o*) children of a former marriage were

(*i*) *Ibid.* And see *S. C.*, *L. R.*, 19 C. D. 47; 51 *L. J.*, Ch. 5; 45 *L. T.* 437; affirmed, *S. C.*, 20 C. D. 742; 51 *L. J.*, Ch. 5; 45 *L. T.* 437; 30 *W. R.* 314.

(*k*) *Navin v. Prouse*, 6 Ves. 752, 758.

(*l*) *Newstead v. Searles*, 1 Atk. 265, following a still earlier case of *Jenkins v. Kymes* (Cir. 1642), where the consideration of a first marriage

was held to extend to the children of a second marriage.

(*m*) *Clayton v. Earl of Wilton*, 6 Maule & Sel. 67, n.; 3 *Mad.* 302.

(*n*) *Dickinson v. Wright*, 5 H. & N. 401.

(*o*) *L. R.*, 6 C. D. 144; 41 *L. J.*, Ch. 809; 36 *L. T.* 690; 25 *W. R.* 772. Cf. *Mackie v. Herbertson*, *L. R.* 9 App. Ca. 303.

held entitled to enforce a covenant to pay an annuity made by a widow on her second marriage, notwithstanding that they were considered to be volunteers. In this case children of a previous marriage are treated as forming an exception to the rule that volunteers cannot enforce a covenant (*p*).

It may, however, be doubted whether it is really necessary in most cases to rely upon any such exception, and whether it is not sufficient to consider that their benefit may be taken for granted to have been stipulated for in accordance with the theory above stated, and that accordingly they are not strictly volunteers.

Voluntary  
settlements  
good against  
settlor.

As against the settlor himself, a settlement may be binding if the trust be executed, even though there is no such consideration shown as would make it binding against subsequent purchasers (*q*); but it would be otherwise, it seems, if the trust were still executory (*r*).

*Paul v. Paul.*

Where by a marriage settlement the wife's property was settled after life estates to the husband and wife, and, in default of children, in the event of the wife surviving, on her, and in the event of the husband surviving, as the wife should by will appoint, and in default of appointment on her next of kin, excluding the husband, it was held that a trust was declared by the settlement for the next of kin of the lady, and that inasmuch as the fund had been transferred to the trustees, the fact of their being volunteers did not enable the trustees to part with it without the consent of their *cestuis que trustent*, and that such had been the rule ever since the Court of Chancery had existed (*s*).

(*p*) Per Fry, L. J., in *Gale v. Gale*, *ubi sup*.

(*q*) Dart, 5th ed. p. 893; *Davenport v. Bisshopp*, 1 Ph. 698; *S. C.*, 2 Y. & C. C. O. 451.

(*r*) *Paul v. Paul*, L. R., 20 C. D. 742; 51 L. J., Ch. 6; 45 L. T. 437; 30 W. R. 314; affirming Fry, J., in 19 C. D. 47; 51 L. J., Ch. 6; 45 L. T. 437; and overruling the decision of Malins, V.-C., in *Paul v.*

*Paul*, L. R., 15 C. D. 580; 50 L. J., Ch. 4; 43 L. T. 239; 29 W. R. 281.

(*s*) Per Jessel, M. R., in *Paul v. Paul*, L. R., 20 C. D. 742; on appeal from Fry, J. (*S. C.*, 19 C. D. 47), who conceived himself bound by a decision of Malins, V.-C., on a former petition in the same matter: *S. C.*, L. R., 15 C. D. 580 *et ubi sup*.

And, in the same case, it was laid down that the next of kin of the lady were *cestuis que trustent* under the settlement, although they were not yet ascertained; and that assuming, as might be done, that the trust would not have been enforceable had it been still executory, yet that the trust was executed, and the next of kin had an interest as *cestuis que trustent*, and it was immaterial that they were volunteers, and accordingly, that if the trustees were to part with the fund, they would be guilty of a breach of trust (t).

In one case (u), however, Lord Romilly held a limitation contained in a marriage settlement in favour of nephews and nieces invalid against the settlor himself; but this case seems to have been decided on the ground that such a trust had been inserted without her knowledge, and contrary to her intentions, or, at all events, that a competent draftsman would have inserted a power of revocation, and in this view the decision is not inconsistent with the later cases (x).

If trust executed,

volunteers may become *cestuis que trustent*.

(t) Per Cotton, L. J., L. R., 20 C. D. 744.

(u) *Wollaston v. Tribs*, L. R., 9 Eq. 44; 18 W. R. 83; 21 L. T. 441.

(x) See also upon this subject, *Huguenin v. Baseley*, 14 Ves. 273; *Pulvertoft v. Pulvertoft*, 18 Ves. 84; *Harbidge v. Wogan*, 5 Ha. 268; *Nanney v. Williams*, 22 Beav. 462; *Forshaw v. Welaby*, 30 Beav. 243; *Cooke v. Lamotte*, 15 Beav. 234; *Phillipson v. Kerry*, 32 Beav. 628;

*Toker v. Toker*, 3 De G., J. & S. 472; *Lister v. Hodgson*, L. R., 4 Eq. 30; *Coutts v. Acworth*, L. R., 8 Eq. 558; 17 W. R. 1121; 38 L. J., Ch. 694; *Everitt v. Everitt*, L. R., 10 Eq. 405; 39 L. J., Ch. 777; 23 L. T. 136; 18 W. R. 1020; *Phillips v. Mullings*, L. R., 7 Ch. 244; 41 L. J., Ch. 211; 20 W. R. 129; *Welman v. Welman*, L. R., 15 C. D. 570; 49 L. J., Ch. 736; 43 L. T. 145; 29 W. R. (Dig.) 196.



## CHAPTER II.

## SETTLEMENTS BY INFANTS.

Proper settle-  
ments by in-  
fants always  
binding,

PREVIOUSLY to the Infants' Settlement Act (*a*), much doubt existed as to how far settlements made by infants, in contemplation and consideration of their marriage, could be binding upon them.

On the whole there seems to have been a preponderance of authority in favour of the opinion that such settlements, when of a reasonable and proper nature, were binding, and this whether the infants were male or female, and whether the property was real or personal, and whether in possession or reversion (*b*). But in every such case it was essential that the settlement should be of a proper nature. To bind an infant a settlement, it was said, must be fair and reasonable (*c*).

both as to  
realty and  
personalty.

It has been laid down that a settlement or agreement to settle by an infant with regard to realty, is equally binding as with regard to personalty. Thus Lord Maclesfield said that if a feme infant seised in fee on her marriage should, with the consent of her guardians (*d*), covenant in consideration of a settlement to convey her inheritance to her husband, then if the settlement were competent, equity would execute the agreement, though no action would lie at law to recover damages (*e*). It seems, also,

(*a*) 18 & 19 Vict. c. 43; see Appendix of Statutes.

(*b*) But different views have been held on the subject, and it has been laid down in a leading text book that a settlement of realty by an infant is not binding. See Watkins' Conveyancing, 9th ed., p. 422 (note).

(*c*) Per Lord Thurlow, in *Williams v. Williams*, 1 Bro. C. C. 152.

(*d*) But as to the necessity for this consent, see *infra*, p. 10.

(*e*) *Cannel v. Buckle*, 2 P. W. 244. But this expression of opinion was, perhaps, not necessary for the decision of the case. And see *Lucy v. Moor*, 3 Bro. P. C. 54; *Price v. Leys*, 3 Barnard. 123; *Harvey v. Ashley*, 3 Atk. 607; *Buckinghamshire (E. of) v. Drury*, 4 Bro. C. C. 505 (n.); and *Durnford v. Lane*, 1

that in these cases a covenant or assignment by an infant, though void at law, operates in equity as an agreement, which is only voidable (*f*); and where, after articles of agreement for a settlement previous to the marriage of a female infant, the wife and husband mortgaged the estate; it was held that the settlement prevailed against the mortgage, except as to the life interest of the husband (*g*), though it was stated in the case by Lord Thurlow, that, under the circumstances, had the wife survived the husband, she might have been free to deal with the property as she chose.

Void covenant  
treated as  
voidable  
agreement.

Infants may attempt in contemplation of marriage to bind their interests either negatively or positively. Negatively so far as they renounce their prospective rights to dower, thirds, tenancy by the curtesy, or the like. Positively by assuring, or agreeing to assure, their own property on the trust of the settlement. There are many cases to show that in both ways settlements were binding upon infants, whether male or female, if, as above appears, the settlement was a reasonable and proper one (*h*).

Negative and  
positive  
agreements.

Bro. C. C. 106; *Pearson v. Pearson*, 1 Bro. C. C. 291; *May v. Hook*, Co. Litt. 246 a (note 1); and *Clough v. Clough*, 5 Ves. 717.

(*f*) *Zouch v. Parsons*, 3 Burr. 1994.

(*g*) *Durnford v. Lane*, 1 Bro. C. C. 106. In this case Lord Thurlow said that it was not competent to the husband, being a party to the settlement, to sell to the purchasers, and the husband and wife had joined in selling the estate for which the husband had been paid, and that the husband could not take an estate for his own benefit contrary to his covenant to take it for the uses of the settlement, and therefore should be a trustee to those uses; and that it was extremely difficult to say that, although he could not take it to his own use, that he could do it by selling it and putting the money into his own pocket. See also *Milner v. Lord Harewood*, 18 Ves. 275,

where this case is approved by Lord Eldon, and it expressly laid down that, though a female infant is not bound by an agreement to settle her real estate, yet, if she does not when of age wish to accede to it, her husband would not be permitted to aid her in defeating it, nor his act during coverture effectual.

(*h*) See *Williams v. Chitty* (*Chitty v. Chitty*), 3 Ves. 545, 551; *Buckinghamshire (E. of) v. Drury*, 4 Bro. C. C. 505 (n); *Carruthers v. Carruthers*, 4 Bro. C. C. 499, 511; *Smith v. Smith*, 5 Ves. 189; *Warburton v. Lytton*, 4 Bro. C. C. 440; *Price v. Leys*, 3 Barnard. 123; *Williams v. Williams*, 1 Bro. C. C. 152; *Cannel v. Buckle*, 2 P. W. 243, 244; *Harvey v. Ashley*, 3 Atk. 607; *Ainslie v. Medlycott*, 9 Ves. 19; *Broderick v. Broderick*, 1 P. W. 229; and *Slocumbe v. Glubb*, 2 Bro. C. C. 545.

Provision for wife must be certain.

One of the requisites of such a reasonable settlement was that the provision for the infant of a female in lieu of her right to dower, or the like, should be certain and not precarious, and should endure during at least the whole of her life (*i*).

It was considered, also, that only those things which were in contemplation at the time of the settlement would be bound; and a covenant to settle after-acquired property was not held to bind property afterwards coming in from an unexpected source (*k*).

But *choses in action* and reversionary interests might be bound if it were so intended (*l*).

Consent of guardians not necessary.

In some cases stress was laid on the fact that the settlement was made with the consent of the guardians of the infant, but it seems probable that though their concurrence might be a wise precaution, yet that the absence of their consent would not render invalid a proper settlement, nor their consent make valid one which was improper (*m*).

An infant desirous of disputing a settlement will, as might be supposed, have to elect, and will be unable to take advantage of some provisions of the settlement while avoiding others (*n*).

Election by wife.

A wife may elect during coverture to confirm a settlement (*o*), and facts manifesting a deliberate intention to recognize the settlement will amount to an election to confirm it, and her covenant when so ratified is as binding as if it had been originally made by a person who was *sui juris* (*p*).

(*i*) *Carruthers v. Carruthers*, 4 Bro. C. C. 499, 511; *Smith v. Smith*, 5 Ves. 189.

(*k*) *Williams v. Williams*, 2 Bro. C. C. 152.

(*l*) *Price v. Leys*, 3 Barnard. 123.

(*m*) *Durnford v. Lane*, 1 Bro. C. C. 106; *Harvey v. Ashley*, 3 Atk. 607; *Ainslie v. Medlycott*, 9 Ves. 19; *Carruthers v. Carruthers*, 4 Bro. C. C. 499.

(*n*) As to what amounts to such an election, see *Harvey v. Ashley*,

3 Atk. 616; *White v. Cox*, L. R., 2 C. D. 387; 4 L. J., Ch. 685; 34 L. T. 418; *Ashton v. M'Dougall*, 5 Beav. 51; *Milner v. Lord Harewood*, 18 Ves. 259.

(*o*) *Wilder v. Pigott*, L. R., 22 C. D. 263; 52 L. J., Ch. 141; 48 L. T. 112; 31 W. R. 377; *Smith v. Lucas*, L. R., 18 C. D. 531; 45 L. T. 460; 30 W. R. 451; *Barrow v. Smith*, 4 K. & J. 409.

(*p*) Per Kay, J., in *Wilder v. Pigott*, L. R., 22 C. D. p. 267.

And if the wife be a lunatic, not so found by inquisition, the Chancery Division of the court may, under its inherent jurisdiction, elect for her (*q*).

Another question not unfrequently arises apart from the question of election, namely, whether a settlement voidable against a settlor by reason of his infancy has been so subsequently confirmed as to cease to be voidable. On this point it is to be observed that the deed of an infant is voidable only and not void, and that if the infant wish to disclaim the deed he should do so within a reasonable time after attaining the age of twenty-one years, and that unless the deed be so avoided, it may become binding on the infant. Where an infant settlor upon attaining full age was under the disability of coverture, but became discoverd in 1846, and from that time up to the time of her becoming of unsound mind, about 1863, had never disclaimed the deed, it was held to be binding upon her, and it was also held that as she had in fact confirmed the deed in part by directing her share in certain residuary estate to be paid to the trustees, she, having confirmed it in one respect, was to be taken to have confirmed it altogether (*r*).

Subsequent  
confirmation  
of settlement  
by infant.

Much of the old learning on the subject is now becoming obsolete, and though, from time to time, cases may still arise to which the doctrines of the old law, as above stated, may be applicable, yet their importance has been much diminished by comparatively recent legislation, and it may be assumed that settlements by infants will now rarely be made, save, perhaps, by inadvertence, except under the statutory provisions. The Infants' Settlement

The Infants'  
Settlement  
Act.

(*q*) *Wilder v. Pigott*, *ubi sup.* And as to the conflict between the jurisdiction in lunacy and in Chancery in such cases, see also *Jones v. Lloyd*, L. R., 18 Eq. 266; 43 L. J., Ch. 826; 30 L. T. 487; 22 W. R. 785; *Beall v. Smith*, L. R., 9 Ch. 91; 43 L. J., Ch. 245; 29 L. T.

625; 22 W. R. 784.

(*r*) *Davies v. Davies*, L. R., 9 Eq. 468. See 39 L. J., Ch. 343; 22 L. T. 605; 18 W. R. 634. And see *Milner v. Lord Harewood*, 18 Ves. 259; *Ashton v. M'Dougall*, 5 Beav. 56; and *Harvey v. Ashley*, 3 Atk. 607.

Act (s) has provided a simple means whereby males, not under twenty, and females, not under seventeen years of age, may make binding settlements upon marriage of every sort of property; and in every case, where possible, the means provided by this act for making a valid settlement should be employed. Indeed, inasmuch as the previous law on the subject, always doubtful, has been rendered still more open to doubt by the introductory recitals of the statute in question (t), which seem to negative the possibility of an infant binding him- or herself previously to and independently of the act, it would seem very unwise now to attempt to settle an infant's property except by the machinery supplied by the statute (u).

The Infants'  
Relief Act.

By the Infants' Relief Act, 1874, contracts by infants, except for necessities, are made not only void but incapable of subsequent ratification. It may, however, be that a proper settlement would be deemed a necessary, and it is probable that this statute may be considered not to materially affect the previously existing law as to marriage settlements (y).

It has been held that a settlement of an infant's property may be made on the occasion of his or her marriage, under the Infants' Settlement Act, after the marriage has taken place (z).

(s) 18 & 19 Vict. c. 43.

(t) The act recites that inconveniences arose "in consequence of persons who may marry during minority, being incapable of making binding settlements of their property."

(u) For the act and the orders under it, see Appendix of Statutes.

(x) For forms of application under this act, see Dan. Prec., 3rd ed. p. 1228 *et seq.*; and for forms of orders, see Seton, 4th ed., 765, 766.

(y) See 37 & 38 Vict. c. 62. By this act it is enacted as follows: Sect. 1, "All contracts, whether by specialty or simple contract, henceforth entered into by infants for the re-

payment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessities), and all accounts stated with infants, shall be absolutely void. Provided that this enactment shall not invalidate any contract into which an infant may by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable." By sect. 2, an infant is prevented from subsequently confirming such a contract.

(z) *In re Sampson and Wall* (infants), L. R., 25 C. D. 482. (Per Selborne, L. C., and Fry, L. J., Cotton, L. J., *dubitante*.)

## CHAPTER III.

## MARRIAGE ARTICLES.

It not unfrequently happens that for want of time or in order possibly to save expense no formal settlement is made previously to the marriage, but the parties are content with the execution of a less formal document of agreement, comprising more or less fully the heads of the intended settlements. These can afterwards be embodied at leisure in a formal deed of settlement, and in fact, so far as it extends, such agreement is equally binding in equity as the most formal settlement (a).

Heads of intended settlement or "articles."

Such documents as those just referred to are not unfrequently styled Marriage Articles.

Articles are construed with the greatest liberality so as to carry out the intention of the parties, and in framing a settlement in pursuance thereof they are to be regarded in the light of instructions for a settlement or as only heads or minutes of an agreement, not to be followed too literally, but in accordance with the intention of the parties (b).

Marriage articles liberally construed.

The instrument may, however, be so fully and perfectly expressed as to be treated as the complete contract and not merely as being executory (c). Words, however, in articles which would create an estate tail may be cut down so as to

Estate tail reduced to life estate.

(a) It is very inadvisable, however, to trust to such articles in cases where it can be avoided. In the first place, their construction is often open to question, and litigation may thus ensue; and, secondly, so far as they affect realty, should the estate to which they relate get into the hands of a purchaser without notice, he may probably be able to retain it, and the settlement may thus be defeated.

(b) Per Lord Hardwicke in *Blandford v. Duke of Marlborough*, 2 Atk. 645; and per Lord Loughborough in *Randall v. Willis*, 5 Ves. 276. And see *Trevor v. Trevor*, 1 P. W. 622; 1 Eq. Ca. Ab. 387; *Phillips v. James*, 3 De G., J. & S. 72; and *Symonds v. Wilkes*, 13 W. R. 1026.

(c) *De Haviland v. Saumarez*, 14 W. R. 118; *Fullerton v. Martin*, 1 Dr. & S. 31.

Intention to  
be respected.

confer a life estate only to accomplish the intention of the parties. In *Trevor v. Trevor* (*d*), where the marriage articles provided that the estate should be settled on Sir John Trevor (the settlor) for life without impeachment of waste, with remainder to the heirs of his body by his intended wife, it was held that though the terms of the articles would in law have given an estate tail to the settlor, yet equity would construe them to give him an estate for life only with remainders over. In this case Lord Parker said that it would be a strange and vain construction of the articles if the settlor should have such an estate by them, the limitations of which the very next day he might by a fire destroy, and that if a different construction were made upon marriage articles it would give way to fraud and over-reaching, and to the defeating of the manifest intention of the parties in settlements in which the issue of the marriage are considered as purchasers. It is to be observed, however, that in this case some weight was given to the fact that the limitation to the settlor was given without impeachment of waste, a provision stated to be of no purpose in case an estate tail was conferred, and only consistent with the creation of a life estate (*e*).

Presumed in-  
tention to  
benefit the  
children.

The principles upon which marriage articles are to be construed and the distinction between their construction, and that of similar words in wills, are laid down in *Blackburn v. Stables* (*f*), when Sir William Grant said

(*d*) This was a suit between the eldest son of the distinguished lawyer, Sir John Trevor, who, it is said, had incurred his father's displeasure by having married a lady of no fortune, and his brother and sisters, as to the power of their father over estates comprised in his marriage articles. From the decision in this suit an appeal was brought to the House of Lords, where the matter was greatly debated between the Lord Chancellor Parker and Lord Nottingham for the decree, and Lords Trevor and Harcourt against it, but at length

the decree was affirmed without any division. See 1 P. W. 620, 634.

(*e*) *Ibid.* 631.

(*f*) 2 V. & B. 367, 370. See also *Highway v. Banner*, 1 Bro. C. C. 584. And as to the distinction between marriage and other executory contracts, in that the intention of the former to provide for the issue of the marriage may be taken for granted, see *Blackburn v. Stables*, *ubi sup.*; *Stamford (E. of) v. Hobart*, 3 Bro. P. C. 31, and *Sackville-West v. Holmesdale*, L. R., 4 H. L. 543.

that he knew of no difference between an executory trust in marriage articles and in a will, except that the object and purpose of the former furnish an indication of intention which must be wanting in the latter. When the object is to make a provision by the settlement of an estate for the issue of a marriage, it is not to be presumed that the parties meant to put it in the power of the father to defeat the purpose, and to appropriate the estate to himself. If, therefore, the agreement is to limit an estate for life, with remainder to the heirs of the body, the court decrees a strict settlement in conformity to the presumable intention; but if the will directs a limitation for life, with remainder to the heirs of the body, the court has no such ground for decreeing a strict settlement. A testator gives arbitrarily what estate he thinks fit. There is no presumption that he means one quantity of interest more than another, an estate for life rather than an estate tail or in fee. The subject being mere bounty, the intended extent of that bounty can be known only from the words in which it is given; but if it is clearly to be ascertained from anything in the will that the testator did not mean to use the expressions which he has employed in their strict proper technical sense, the court in decreeing such settlements as he has directed, will depart from his words in order to execute his intention; but the court must necessarily follow his words unless he has himself shown that he did mean to use them in their proper sense, and has never said that because the direction was for entail they would execute that by decreeing a strict settlement.

Secus in will.

Distinction as to wills.

In wills words must be followed.

It seems that an executory agreement to settle land will be carried out in accordance with the rules of common law, even though the land be subject to some special mode of descent, for instance, where the tenure is gavelkind (*g*).

The fact of marriage gives a consideration for marriage articles (*h*), and the performance of the entire contract by

Marriage a consideration.

(*g*) Per Lord Hardwicke in *Roberts v. Dixwell*, 1 Atk. 607.

(*h*) See chapter preceding.



one party is not a condition precedent to his enforcing the performance of the agreement by the other. Thus, when the husband and the wife's father had entered into mutual covenants, the fact that the husband had neglected to perform his own covenant, did not prevent him from enforcing his claim against his father-in-law's estate (i). In this case, no one had been damaged by the default of the husband, the wife having died without issue. Had it been otherwise, the court would not have allowed him to take any benefit until he had performed his part of the agreement (k).

Limited effect  
of power to  
vary articles.

A power to alter or vary the articles before the execution of the settlement, in such manner as the intending settlors may think fit, or the like, is sometimes introduced into marriage articles; but it seems that the power, even when general in its terms, will be held to extend only to alterations of the terms and provisions of the intended settlements as amongst the persons already intended to be benefited, and will not authorize the insertion of fresh trusts in favour of persons not previously contemplated, as, for instance, a second wife, or the children of a second marriage (l).

Moreover, it seems doubtful how far a settlement in consideration of an intended marriage can be revoked, even where there is a power of revocation previously to the marriage, when the same marriage afterwards takes place (m).

Meaning of  
"usual  
clauses."

Marriage articles often provide in general terms that all usual and proper clauses shall be inserted in the contemplated settlement, or to the like effect. And it has been much discussed from time to time what are the

(i) *Jeston v. Key*, L. R., 6 Ch. 610.

(k) *Ibid.* And see preceding chapter.

(l) *Duke of Marlborough v. Marquis of Abercorn*, 1 My. & Cr. 312.

(m) *Page v. Horne*, 11 Beav. 277. In this case, the husband and wife

married the day after that on which they had revoked the settlement, and the case was principally decided on the ground of the husband's influence. And see the numerous cases there cited on the subject.

clauses which should be inserted in a settlement in execution of articles providing for the insertion of "usual provisions." The term "usual," it seems, is not to be held to mean "common"; but the distinction as to what provisions ought to be inserted, and what not, seems to depend on the distinction between those provisions which are for the benefit of *all* the parties interested, and those provisions which are for the benefit only of particular parties. Thus, for instance, provisions for sale, exchange, partition (where there is a joint property), leasing mines, granting building leases, and the like, are for the benefit of all parties, and should be inserted; while certain other very common powers, for instance, powers of jointturing, are not to be allowed as being for the benefit of some of the persons interested in the settlement only (*n*).

Not same as  
"common  
clauses.

Thus a power of appointing new trustees has been allowed (*o*); and a power to vary securities may be inserted, even though there has been a direction to invest only in English or French funds (*p*).

Clauses  
allowed.

In an Irish case, the insertion of a "hotchpot" clause has been refused (*q*).

If certain specific powers as to particular parts of the property intended to be settled, for instance, as to land situated in a particular county, are provided for in the articles, this might be held to exclude the insertion of more general powers (*r*).

Consistently with the principles above suggested, powers for the benefit only of particular persons have been refused,

Clauses dis-  
allowed.

(*n*) *Hill v. Hill*, 6 Sim. 145. See also *Wheate v. Hall*, 17 Ves. 80; *Horne v. Barton*, Jac. 437; *Pearse v. Baron*, Jac. 158; *Williams v. Carter*, Sugd. Powers, App. 205; *Turner v. Sargent*, 17 Beav. 520.

(*o*) *Lindow v. Fleetwood*, 6 Sim. 152; *Turner v. Sargent*, 17 Beav. 520.

(*p*) *Sampson v. Gould*, 12 Sim. 426. But in this case the court

was assisted by the context.

(*q*) *Lees v. Lees*, I. R., 5 Eq. 549. But this case is not now followed in practice.

(*r*) Per Shadwell, V.-C., in *Hill v. Hill*, *ubi sup.*, commenting on *Pearse v. Baron*, *ubi sup.* *Sed quære*, and it is probable now that the courts would lean against such a construction.

even where the wording of the articles has been very comprehensive. Thus, where there was a power in the articles for the husband and wife to vary them in any manner they should think fit previously to the execution of the settlement, it was considered that this did not authorize the insertion of powers to jointure a future wife, or to raise portions for the children of a second marriage (s). Again, power to raise portions for younger children were not allowed to be inserted in a settlement, though the articles provided for inserting the powers and provisoes "usually inserted in a settlement of like nature" (t).

Simple direction to settle.

In all the above cases, the articles contained express provision for the insertion of "usual clauses" or the like, and some stress was used in the decision of the particular cases on the exact wording of the articles in this respect; but, in the case of *Turner v. Sargent* (u), it has been held that a direction to make a settlement simply, in itself implies a direction to insert all usual clauses and provisions, such as for leasing, sale, exchange, appointment of new trustees, and the like, and for maintenance, education, and advancement (x).

Strict settlement directed.

A covenant in marriage articles to settle an estate of the husband after payment of an annuity "upon her issue by the said" intended wife, must be construed as a covenant for a strict settlement, and precludes the husband from creating charges in favour of younger children (y). And

(s) *Duke of Bedford v. Marquis of Abercorn*, 1 My. & Cr. 312.

(t) *Higginson v. Barnely*, 2 S. & S. 518, 518.

(u) 17 Beav. 520. With regard to maintenance and advancement clauses, it might almost seem that their insertion was an infringement of the principle above stated, that powers will not be inserted for the benefit of some only of the beneficiaries.

(x) As to what would probably be now considered the usual powers and provisions in a money settle-

ment where there are no special directions, see *Spirett v. Willows*, L. R., 4 Ch. 407.

(y) *Grier v. Grier*, L. R., 5 H. L. 688; and see *Dod v. Dod*, Amb. 274; *Hart v. Middlehurst*, 3 Atk. 371; *Davies v. Davies*, 4 Beav. 54; *Rochfort v. Fitzmaurice*, 2 D. & War. 1; *Trevor v. Trevor*, 1 P. W. 622; *S. C.*, 1 H. L. Cas. 239; *Blackburn v. Stables*, 2 V. & B. 370; *Jervoise v. Duke of Northumberland*, 1 Jac. & W. 570; *Taggart v. Taggart*, 1 Sch. & L. 84; and *Howel v. Howel*, 2 Ves. 358.

an agreement to settle estates in tail was carried into effect by creating limitations in tail male (z).

The usual form and provisions of a settlement of a money fund of a lady, directed by the court to be settled, appear from the case of *Spirett v. Willows* (a), and they will be more fully treated of in a later chapter. It may be added, that some difficulty may arise in arranging the parties to an action to carry into effect marriage articles, especially where no trustees have been named who can be made defendants (b). In an old case it is stated, that if a wife before marriage enter into articles concerning her own estate, she has made herself a person separate from her husband, and is properly a defendant, and this seems to have been taken for granted in other cases (c). And in one case, where husband and wife were suing as co-plaintiffs, it was held that it was necessary that the wife should instead be made a co-defendant (d).

On the other hand, in *Earl v. Ferris* (e), it was held that a wife was not a proper defendant in a case where the question raised was, whether certain funds were for her separate use or not, on the ground, apparently, that to make her a defendant was an admission that she was separately interested, and, so to speak, begging the question (f).

(z) *Duke of Bedford v. Marquis of Abercorn*, 1 My. & Cr. 312.

(a) L. R., 4 Ch. 407, 410, 411; and see *Roch v. Roch*, 2 J. & L. 561; Dav. Conv., vol. iii., p. 663. And see *infra*, Chapter IX., Settlements by the Court.

(b) *Cook v. Fryers*, 1 Ha. 498; *Marquis of Exeter v. Marchioness of Exeter*, 3 My. & Cr. 321.

(c) *Hanrott v. Cadwallader*, 2 Russ. & My. 545.

(d) *Hanrott v. Cadwallader*, *ubi sup.*

(e) 19 Beav. 67.

(f) The cases on the subject seem barely reconcilable, and to depend on minute variations of circumstances. Probably the importance of the question has been materially lessened by recent legislation, especially by the Married Women's Property Act, 1883, and the rules thereunder.

## CHAPTER IV.

## FRAUDS ON MARITAL RIGHTS.

Inchoate right  
of husband in  
future wife's  
property.

*Strathmore v.  
Bowes.*

It has been seen that agreements of an informal nature may suffice to create binding settlements in consideration of marriage. More than this, even without any written or parol declaration, the law implies a certain fetter on the intending wife's power of disposition over her property from the commencement of the marriage treaty. So soon as a woman entitled to property enters into a marriage engagement (a), the intended husband has an inchoate interest in that property, and should she wish to dispose of it she should take care to do so only with the approbation of the intended husband. In fact any attempted disposition of her property under such circumstances without such approbation is liable to be held to be a fraud on the husband's marital rights, and to be consequently set aside. One of the earliest important cases on the subject is the case of *Strathmore v. Bowes* (b), and though the facts of that case are rather special, and no case exactly "on all fours with it" is likely to occur again, it is yet considered a leading authority on the doctrine, from the importance of the judgment of Lord Thurlow therein given. In this case Lady Strathmore being possessed of property, both real and personal, of large amount, while in treaty for marriage with a Mr. Grey, conveyed all her real and per-

(a) As to the exact term when the obligation begins to attach, see *infra*, p. 24.

(b) This case is reported on appeal at 1 Ves. jun. 20; and on first and second hearing at 2 Bro. C. C. 345; and 2 Cox, 28; also *S. C.* in White and Tudor's Leading Cases.

It has even been suggested that, after formal engagement and after certain intimacy, gifts by a husband to the intending wife are void, inasmuch as they are already in the quasi-relation of married people. Co. Litt. 34 a, note (1).

sonal estate to trustees for her sole and separate use notwithstanding any coverture. This was done with the approbation of Grey. A few days afterwards Lady Strathmore, hearing that one Bowes had fought a duel on her account, determined to marry Bowes, and the marriage took place immediately, Bowes having no notice of the settlement. Bowes subsequently filed his bill to set aside the settlement (c). In affirming a decree for the dismissal of the bill in this case (d), Lord Thurlow, L. C., said: "As to the morality of the transaction I shall say nothing. They appear to have been pretty well matched. Marriage, in general, seems to have been Lady Strathmore's object; she was disposed to marry anybody, but not to part with her money. This settlement is to be considered as the effect of a kind of lucid interval, and if there can be reason in madness by doing this she discovered a spark of understanding. The question which arises upon all the cases is whether the evidence is sufficient to raise fraud. Even if there had been a fraud upon Grey, I would not have permitted Bowes to come here to complain of it. But there was no fraud, even upon Grey, for it was with his consent; so I cannot distinguish it from a good limitation to her separate use. Being about to marry Grey she made this settlement with his knowledge, and the imputation of fraud is that, having suddenly changed her mind and married Mr. Bowes, in the hurry of that improvident transaction, she did not communicate it to him; but there was no time, and could be no fraud, which consists of a number of circumstances. It is impossible for a man, marrying in the manner Bowes did, to come into equity and talk of fraud."

Judgment of  
Lord Thurlow.

The doctrine now under discussion, even independently of recent acts dealing with married women's property, is

Doctrine not  
likely to be  
extended.

(c) There was in reality a complex litigation, but the statement in the text seems all that is necessary to be here stated. The fur-

ther facts appear with some fulness in the extract from Lord Thurlow's judgment, which follows.

(d) *Strathmore v. Bowes*, *ubi sup.*

Doubt as to  
principle of  
doctrine.

one not likely to be extended to comprehend cases not falling distinctly within it; and in fact there seems considerable difficulty in reconciling existing cases on this subject, and even in ascertaining the exact principles upon which these cases ought to be decided. In the case just referred to, Lord Thurlow, in the earlier portion of his judgment, seems to consider that the principle by which a husband is relieved under such circumstances is the rule of law, that inasmuch as the law charges the husband with the wife's burdens, therefore he is entitled in full to the marital rights; but further on, in the part above quoted, he says, that the question in all these cases is one of fraud, meaning, no doubt, by that term, actual fraud. In another case (e) Lord Eldon, discussing the principle of such cases, says:—"I should be very unwilling to relax a principle which has long prevailed both at law and in equity, that if a representation is made upon the circumstances of a person about to form a connection in marriage, and the representation is of such a nature that if not made good, or, if varied, it will materially affect the circumstances in life of that party, courts both of law and equity will hold the party bound to make good that representation."

Three things  
must coincide.

The following circumstances must, it is said, coincide in order to destroy the validity of such a settlement. At the time marriage must be in contemplation; the settlement must be made in contemplation of the marriage, and there must be concealment from the husband. If these three things are all found, it is said that the settlement cannot stand (f).

Doubt as to  
necessity of  
fraud.

We shall have occasion to refer further on as to the question whether there must be actual fraud upon the

(e) *De Manneville v. Crompton*, 1 V. & B. 355.

(f) *Goddard v. Snow*, 1 Russ. 490. In this case a settlement was set aside, though made ten months

previously to the marriage, and though no treaty was then proved, and the husband was ignorant of the existence of the fund settled.

husband, or whether constructive fraud is sufficient, as we examine some other cases on the subject. We may, however, premise that the court will look at all the circumstances of each case, such as the conduct and motives of the parties, and their pecuniary position, in dealing with questions of this kind.

The fact that there exists a meritorious consideration for such a settlement of the intended wife's property by her has sometimes been considered a good ground for supporting it, and this would seem to show that something like actual fraud is the ground of the relief afforded in equity, and that it will not relieve where there is no improper motive. Thus, where there was a good moral consideration, namely, to provide for the children of a previous marriage, the settlement was held good (*g*).

Effect of meritorious consideration.

In another case a settlement was supported apparently on no other ground than the merit of the considerations being made by a widow on her second marriage in favour of her children by her first husband (*h*), and a settlement made by a lady in favour of an only sister has been held to have been made for a sufficiently meritorious consideration (*i*). The position of the husband and the fact that he has, if so, brought no accession of property on his side, will be considered in these cases, and the fact that no concealment has been intended, though, in fact, the husband has had no notice, is also a reason for refusing relief (*k*).

The converse of the doctrine above stated, that a good moral consideration may suffice to uphold a settlement, is also true, and the fact that a settlement to the prejudice of the husband is made in favour of persons to whom the

Absence of good consideration.

(*g*) *England v. Downs*, 2 Beav. 522. In this case there was also a doubt whether marriage with the particular husband was contemplated at the time of the settlement.

(*h*) *Hurst v. Matthews*, 1 Vern. 408. And see *King v. Cotton*, 2 P. W. 674; and *Poulson v. Wellington*, *ibid.* p. 533.

(*i*) *St. George v. Water*, 1 My. & K. 610.

(*k*) *Ibid.*



wife is bound by no legal or moral tie may be a reason for holding it invalid (*l*).

In order to render invalid such a settlement as is being discussed, it must have been made during the treaty for the marriage; indeed, otherwise, the concurrence of the intending husband in the settlement would have been impossible (*m*). This period can hardly be defined with exactness, but it appears to correspond with the time after which intimacy, with a view to marriage, between the parties has commenced, and when there is an "active intention on their part to marry" (*n*). And the distance of time, though a material part of the circumstances, is not decisive whether or not marriage was in contemplation (*o*).

Where a settlement is made so as to defeat in terms the rights of a "then intended husband," it may be necessary to show that the husband seeking to set it aside was such then intended husband (*p*). A false representation contained in an instrument that it is a sale for valuable consideration by the intending wife before her marriage seems, in itself, sufficient to render the instrument void against the husband (*q*).

Trustees  
liable.

It remains to add, that in an action to set aside a settlement as a violation of marital rights, if the trustees were at the time of the settlement aware of the nature of the transaction they are parties to the fraud, and may be liable to the costs of the action (*r*).

Married  
Women's  
Property Act,  
1882.

The Married Women's Property Act, 1882 (*s*), has materially altered the nature of the interest of the husband in the property of his wife; and it may be that at all events, as to women married since the date of the

(*l*) *Downes v. Jennings*, 32 Beav. 290.

(*m*) Per King, L. C., in *King v. Cotton*, 2 P. W. 675; but see *Poulson v. Wellington*, *ibid.* 535.

(*n*) *Goddard v. Snow*, 1 Russ. 495.

(*o*) Per Lord Romilly, in *Downes v. Jennings*, 32 Beav. 294.

(*p*) *Ibid.* In this case ten months

elapsed between a settlement afterwards declared void and the marriage.

(*q*) *Llewellyn v. Cobbold*, 1 Sm. & Giff. 376.

(*r*) Per Jessel, M. R., in unreported case, Rolls Court, 28th May, 1879.

(*s*) 45 & 46 Vict. c. 75.

commencement of the act, the doctrine above discussed may be materially modified if not abrogated entirely; it being arguable, in future cases, that a husband during the marriage treaty can scarcely have "inchoate rights" as to property which no longer becomes his upon marriage. Possibly, however, the advantage to the husband practically accruing to him from the possession of property by his wife, which it is reasonable to be supposed will be employed, to a certain extent, for the support of the household and children, would be considered a sufficient interest on his part to make it competent for him still to dispute settlements which would, under the previous law, have been exceptionable on the ground of their being in fraud of his marital rights, at least in cases where there has been anything like active fraud or concealment.

## CHAPTER V.

### FRAUD ON THE MARRIAGE CONTRACT, AND MARRIAGE BROKAGE.

Subsequent contracts may be fraud on marriage settlement,

It has been seen that all secret or underhand dealings with the property of an intending wife, when marriage is contemplated, may be considered as frauds upon the future husband (a). Not only in this case, but under a less obvious head of equitable jurisdiction, all agreements or contracts made even subsequently to the marriage, unless the consent of all parties is obtained (including both husband and wife, and probably the issue), which have the effect of derogating from the contract made on the marriage, are liable to be considered as frauds on the spirit of the marriage contract, and to be set aside accordingly; and the rule is applicable even to funds settled upon the husband absolutely, which it is considered that he ought not to release, as he is thereby precluded from maintaining his wife, at least in so complete a manner as otherwise he might and probably would do.

though affecting husband's absolute interest only.

Thus, where on the marriage of the son, the father, a widower, acquired power to jointure a second wife on payment to the son of a sum of 1,000*l.* absolutely, it was held that a release of the sum by the son could not be enforced by the father (b).

Principle of cases.

The considerations applicable to cases of this class are shown by the judgment in this case of Sir Joseph Jekyll,

(a) See preceding Chapter.

(b) *Roberts v. Roberts*, 3 P. W. 66. This was a very special case. The contract for the release being made on the re-marriage of father not to hold it valid was a fraud on

that marriage contract, as holding it valid was a fraud on the previous marriage of the son. In this conflict of the same principles the maxim *qui prior est tempore potior est jure* was held to apply.

M. R., an extract from which follows: "The son on his marriage, and when the father agreed to pay the 1,000*l.* on his making a jointure to a second wife, engaged not to insist on or expect the payment thereof, which shows it was intended as a fraud upon the son's wife or her relations; and the father's agreeing to pay the 1,000*l.* on such contingency might be some inducement to the son's wife and her relations to come into the match. It appears on the merits that the defendant Roberts, the son, and his wife, are purchasers of the 1,000*l.* in case of the father's marrying again, and making such jointure as he has done. Wherefore, since the payment of this 1,000*l.* by Roberts, the father, may as much contribute to the comfortable subsistence of Roberts, the son, and his wife, as the non-payment of it may conduce to the comfortable living of his father and his wife, and, as by means of this bond the son has the law on his side, I think the bond must be paid" (c).

In *Peyton v. Bladwell* (d), the Lord Keeper (e) strongly condemned as fraudulent and void, and to be held in detestation, underhand agreements to set aside marriage settlements, and in this particular case as the bill of the husband and wife set aside a release given by the husband of a covenant to settle on the husband absolutely lands of the value of 100*l.* yearly as being a fraud and deceit as to one Sir John Roberts, uncle of the wife, who had been drawn in to give a large portion with his niece in expectation of her having an adequate settlement. Releases by husband.

In this case it is to be remarked, that the land if given to the husband would have been subject to no trust in his hands, and he could have disposed of it in any way he chose; yet it was considered that it would be, in the ordinary course of events, for the benefit of his wife and issue that he should have it. It is also to be noticed, that Release by husband of his own property voidable.

(e) *Roberts v. Roberts*, 3 P. W. 75.  
(d) 1 Vern. 240.

(e) Sir Francis North, A.D. 1682.

in this case the sole plaintiffs were the husband (who was a party to the so-called fraud) and his wife, who had no direct interest in the property.

Early cases.

In another early case it is laid down, that that which is the open and public treaty and agreement on marriage shall not be lessened or infringed by any private agreement; and so, where a mother joined in the marriage settlement of her son, and thereby accepted an annuity of 15*l.* in lieu of her jointure out of certain property, and the day before the settlement privately took from her son a covenant for payment to her of an additional 10*l.* a year, it was held that the latter covenant could not be enforced against the administratrix of the son, and that she was entitled to have an action upon it restrained in equity (*f*).

Bond to repay part of portion.

In another case (*g*), on a treaty of marriage between A. and the daughter of B., the mother of A. surrendered part of her jointure, to enable her son to make a settlement, and B. agreed to give her daughter a portion of 3,000*l.* A., without the privity of his mother, gave a bond to his intended father-in-law to pay back 1,000*l.* It was decreed that the bond ought to be given up as a fraud on the marriage contract.

Contract void-able though long subsequent.

In many of the cases the contract, in derogation of the treaties of marriage, was made simultaneously with or previously to the marriage settlement, and this circumstance would be important as showing a want of *bonâ fide* in the particular case; but a consideration of the cases and the principles seems to show that neither the time nor the secrecy of the transaction are indispensable in such cases, and that in equity such contracts cannot be enforced, even though made openly and long after the marriage. So far as the author is aware, there is no case in which persons interested collaterally under the settlement have been

(*f*) *Lambe v. Hanman*, 2 Vern. 499. And see *Redman v. Redman*, 1 Vern. 348, and *Gale v. Lindo*, 1 Vern. 475.  
(*g*) *Turton v. Benson*, 2 Vern. 764.

held entitled to object. In most of the cases the contract, in derogation of the marriage contract, has been ultimately resisted by the party entering into it or his representative, but it is possible that other parties might insist on the later contract being set aside (even if the objection were not raised by the party bound by it); for instance, the children of the marriage, or even the person who had contributed a marriage portion, upon the strength of its being met by the settlement, intended to be derogated from.

Parties to set aside contract.

The cases on the subject are for the most part very old, yet there is little doubt that the doctrine of equity is still subsisting, and would be exercised in fit cases, though it is possible that it would not now be extended.

How far doctrine survives.

It may not be out of place here to call attention shortly to another class of contracts connected with marriage, which are liable to be held fraudulent in equity, namely, contracts made in consideration of the procurement of the marriage.

The invalidity of such bonds (usually taking the form of and known as marriage brokerage bonds) was first established in the case of *Potter v. Hall* (*h*), though not without much litigation and difference of opinion. In this case it was considered that such bonds were to be condemned in equity with a view to obviate a growing mischief occasioned by servants and other mean persons taking these bonds for procuring marriages into great families, which produced very unequal matches, to the unspeakable uneasiness and discomfort of friends, on account of such alliances.

Marriage brokerage contracts voidable.

In *Roberts v. Roberts* (*i*), Sir Joseph Jekyll, M. R., commenting on *Potter v. Keen* (*k*), observed that the practice

*Roberts v. Roberts.*

(*h*) Cited in *Law v. Law*, 3 P. W. 391. This was a case as to the validity of a bond for assisting in promoting a marriage which afterwards took effect. The cause was heard first before Sir John Trevor, M. R., who relieved against the bond; afterwards Lord Somers

reversed this decree, and the lords reversed the decree of reversal. Cases in Parliament, 76. See also the case of *Roberts v. Roberts*, 3 P. W. 76.

(*i*) 3 P. W. 76.

(*k*) Ca. in Parl. 76.

of the courts in relieving against all brokerage bonds, plainly showed it to be their opinion that every contract relating to marriage ought to be free and open, and he took notice that in that case, where there was a bond to pay money for procuring a marriage, the Lord Somers decreed in favour of the bond, conceiving that as the procuring a marriage was a good consideration at law for an *assumpsit*, so, provided the bond were in a reasonable sum, the same might be a good consideration for a bond in equity. But the lords, with great justice, reversed the decree of Lord Somers, for that it would be of dangerous consequence to allow any such bonds, as tending to induce many improvident marriages.

And where a bond was given by the plaintiff to pay the defendant the sum of 160*l.*, less 40*l.* for each 1,000*l.*, whereby the intended wife's property was less in value than 4,000*l.*, the bond was decreed to be set aside, the court characterizing a marriage so obtained without the parent's consent as a sort of kidnapping (*l*).

Principle one  
of public  
policy.

The ground upon which courts of equity interfere in cases of this sort is not upon any notion of damage to the individuals concerned but from considerations of public policy; marriages of a suitable nature and upon the fairest choice being of the deepest importance to society (*m*).

The doctrine, however, as appears from the consideration of some of the cases above cited, is comparatively modern; and, indeed, the civil law allowed *prozenetæ*, or match-makers, to receive a suitable reward (*n*).

(*l*) *Drury v. Hooke*, 1 Vern. 411.  
And see *Hall v. Potter*, 3 Lev. 411,  
and *Debenham v. Ox*, 1 Ves. sen.  
277.

(*m*) Story Equity Jurisprudence,  
§ 261.

(*n*) *Ibid.* § 260.

## CHAPTER VI.

## RE-SETTLEMENTS AND PARENTAL INFLUENCE.

IN cases of large and strictly settled properties a re-settlement of the settled property is usually made if the son attain the age of twenty-one years in the lifetime of his father. In that event the father not unfrequently gives the son a provision during their joint lives, in consideration of which the son joins with his father in re-settling the estate in such a manner that if he die without issue the estate may go over to the younger branches of the family. Sometimes, instead of a rent-charge, the estate itself has been given to the wife for life after her husband's death, in which case the son cannot after his father's death and during his lifetime unfetter the estate without her concurrence. In cases where a re-settlement is made on the eldest son attaining twenty-one years, and a provision is made for him during the joint lives of him and his father, it is not unusual to increase the mother's jointure, and to add to the younger children's portions, besides confining the son to a tenancy for life, and giving the estate over to the younger branches, if his issue, for whom, of course, provision is first made, should fail (a).

Re-settle-  
ments on sons  
attaining age.

There are of course infinite varieties in the details of re-settlements, but the provisions just mentioned are perhaps those most usual in such transactions. The advantage to the son, it is to be observed, in consideration of which he so curtails his absolute reversionary interest, being the

Usual form  
of.

(a) See Lord St. Leonards' Handy Book of Real Property, p. 138.



receipt by him of an immediate certain allowance in lieu of his being dependent only on the bounty of his parents.

Influence of parent.

In this way, no doubt, influence may be brought upon a young man to induce him to sacrifice the future for the present, and to bind his reversionary interests for an insufficient consideration.

Court favours a re-settlement if fair.

Thus it happens sometimes that the child, or it may be some person claiming through him, may dispute the validity of a re-settlement so made, on the ground that the child has been induced to give up his rights by an exercise of undue parental influence. The inclination, however, of the court is to support such a transaction where there has been fair dealing with the son, and it will not weigh in very nice scales the consideration on the one side or the other. There must, however, have been no advantage taken of the child's youth or inexperience, or of his necessities (*b*).

Thus, in *Cory v. Cory* (*c*), Lord Hardwicke says that if a son tenant in tail, and father tenant for life, agree on something for the benefit of the younger children, and afterwards the son complains of paternal influence being exerted, though there might be something of that sort, yet if the agreement be reasonable the court will not set it aside.

*Manners v. Banning.*

In *Manners v. Banning* (*d*), one of the earliest, if not the earliest, case on the subject, Lady G., being seised in fee of certain lands, conveyed the same to her father in fee, but on the understanding that he was to convey, as was done, those lands, together with others of his own, in trust for the lady for her life for her separate use, and afterwards to every of her sons in tail, and on a bill by a devisee of Lady G. against the remainderman to set aside the settle-

(*b*) See *Glissen v. Ogden*, cited at *Young v. Peachy*, 2 Atk. 258.

(*c*) 1 Ves. sen. 19. And in *Winnington v. Foley*, 1 P. W. 536, Lord Hardwicke expresses his approval

of such re-settlements as a means of preserving an estate longer in the family. And see *Gordon v. Gordon*, 3 Swanst. 462.

(*d*) 2 Eq. Ca. Abr. 282.

ment, the Lord Chancellor (*e*) said, that though a deed made by a child to a father doth generally lie under suspicion of a trust and a fraud, by reason of the authority which the father has over the child, yet neither the law nor equity saith that it is void, and that the court would support it when done upon good consideration, and that Lady G. was the darling of her father, and that he had prevailed upon her to convey the lands to him in order to settle them upon her in a prudent manner, and that such obedience did not effect her prejudice, inasmuch as she so obliged him that he settled other lands twice the value thereof upon her.

The general principle upon which such settlements are to be supported was explained by the late Sir Charles Hall in *Fane v. Fane* (*f*), where he said: "I should certainly not seek to disturb the course of the decisions as to re-settlements by father and son, if I had the power (which I have not) to do so. They are not to be interfered with lightly, and the parental influence in reference to such re-settlements, where there is no other consideration or element in the case is, I conceive, to be disregarded; for the court has thought such re-settlements desirable, and has favoured them, but every case must be looked at with reference to all the circumstances attending the re-settlement."

Principles on which settlement valid.

Mistake will, however, be a ground for invalidating such a re-settlement, and in the case just cited the settlement was in fact not ultimately sustained, it being considered to be founded on a mistake common to the parties, and one to which the father and legal adviser of the son were innocently accessory (*g*).

Mistake.

In these cases it is not unusual for the son, a young man who of course knows nothing about settlements and the mode of dealing with property, to act through the legal

Same solicitor employed.

(*e*) Lord Cowper.  
(*f*) L. R., 20 Eq. 698; 24 W. R. (Dig.) 260. And see *Cooper v. Phibbs*, L. R., 2 H. L. 149; 15 W. R.

1049; 16 L. T. 678.  
(*g*) *Fane v. Fane*, *ibid.* And see *Welman v. Welman*, L. R., 15 C. D. 670.

adviser of his father. Ordinarily in these settlements there is no fault to be found with that: but the adviser of the father who thus becomes the adviser of both must, under such circumstances, take great care that the true state and position of the title to the property is accurately represented to the son (*i*).

Personal advantage to father.

There are, indeed, few reported cases in which such a settlement as we have been discussing has been set aside on the ground of the undue influence of the father, and where this has been done it seems to have been done on the ground that the father took some personal benefit himself, and one in excess of any consideration he gave; and the giving a son an allowance for his maintenance may not in such case be a sufficient consideration to justify the father benefiting himself out of the settled property. Thus, in *Heron v. Heron* (*k*), where the case arose of a son releasing to his father the orphanage share to which he would be entitled under the custom of London, Lord Hardwicke said that he took it to be the rule of the custom of London that if a father would oblige a son merely for the sake of maintenance, and not for advancement in marriage or trade, to release his right to the orphanage share, that such release would be absolutely void, inasmuch as the father, by the laws of nature, was obliged to maintain his children, and such an attempt in a father would be a plain fraud upon the custom; and, in the same case (*l*), Lord Hardwicke expressly puts the case of a father taking advantage of the poverty of his son, and says that supposing the plaintiff had been entitled to a tenancy in tail of real estate, and the father, a bare tenant for life, had taken such an advantage of his son's necessities as to draw him in to join in any conveyance which would destroy his remainder, then that the court upon very slender evidence would have relieved the son.

Son's necessities.

(*i*) *Fane v. Fane*, *ubi sup.*, L. R., p. 707. And see *Jenner v. Jenner*, 2 Giff. 232; 2 De G., F. & J. 359, and

*Hoghton v. Hoghton*, 15 Beav. 238.

(*k*) 2 Atk. 160.

(*l*) *Ibid.*

So, where one Zaccheus Bredon, being tenant for life, obtained a common recovery in his own favour from his daughter on the ground that it would be for her benefit, the only consideration to the daughter being an annuity of 30*l.* a year, paid for some time while the property in question was of the yearly value of 140*l.*, it was held that the transaction could not be supported (*m*).

Insufficient consideration.

And in a more recent case Romilly, M. R., distinctly laid down that the relation of parent and child was similar to that of guardian and ward, solicitor and client, and the like, and though the exercise of parental authority might be advantageous, yet it ought not to be exercised for the benefit of the person exercising it; and that a direct benefit for the father from the son would raise a presumption of undue influence, the interests of the family, that is to say, of the brothers and sisters and issue of the son, being alone properly to be considered (*n*).

Direct benefit to parent not allowed.

What is a sufficient consideration for a re-settlement by a son is a question of much nicety (*o*). It seems, according to the opinion of the late Mr. Butler there cited, that a son, tenant in tail, re-settling lands in strict settlement at the request of his father, is entitled to some further benefit beyond such amount as the father, as a father and a man of honour would be bound in any case to allow his son (*p*).

Where a son has executed a re-settlement from which he would be entitled to be relieved on the ground that at the time he was without independent advice, or in embarrassed circumstances or otherwise, yet acquiesces in the arrangement and deals with his interests under it after complete emancipation, he will be considered to have

Acquiescence by child.

(*m*) *Young v. Peachy*, 2 Atk. 254.

(*n*) *Hoghton v. Hoghton*, 15 Beav. 278. See also *Archer v. Hudson*, 7 Beav. 551, and *Carpenter v. Heriot*, 1 Eden, 338.

(*o*) See the learned note to Mr. Davidson's *Precedents*, vol. iii., pt. 1, p. 276, note (*b*).

(*p*) See also *supra*, p. 34; and

*Young v. Peachy*, 2 Atk. 254. It has, however, been laid down that the fact that a voluntary allowance by father to son is made permanent and secure on such a re-settlement is itself a valuable benefit to the son, though the amount be not increased. See *Dimsdale v. Dimsdale*, 3 Drew. 556.

adopted the settlement, and it will be too late for him then to attempt to have it set aside (*q*).

Purchases by  
parent from  
child,

There is a great distinction between such family re-settlements as we have just considered and purchases by a father from a son of the son's interest under a settlement. Transactions of the first class are, as we have seen, on the whole favoured by the courts, but transactions between a father and child of a different nature, if made shortly after the child attains his majority, are to be viewed with much jealousy (*r*). In fact, in the latter case, opposite considerations to those applicable to the cases of family re-settlement may arise, inasmuch as the father may so far from re-settling the property unsettle it, and that it may be that he gets the estates into his possession, with the view of benefiting his younger children, is not sufficient in itself if he be not bound so to benefit them (*s*).

are viewed  
with sus-  
picion.

So, where two sons, aged twenty-three and twenty-five years respectively, but stated to be still much under their father's control, gave up their estates in remainder as security for debts due by their father, the security was set aside, the creditors failing to prove that the sons knew the nature of the transaction, and that no undue influence had been exercised by the father (*t*).

Not valid for  
past advances.

And where a son attained the age of twenty-one years in 1855, and in 1857 conveyed to his father his reversionary estate in consideration of moneys advanced for the son's commission and outfit, and payment of his debts during his minority, and a further advance of 500*l.* cash, it was held, that the deed could not stand except as security for the sum of 500*l.* (*u*).

It seems that, on a bill filed to set aside such a deed *in toto*, the court will not reform it in part (*x*).

(*q*) *Dimsdale v. Dimsdale*, 3 Drew. 556.

(*r*) *Baker v. Bradley*, 7 De G., M. & G. 597; *Dimsdale v. Dimsdale*, *ubi sup.*

(*s*) *Dimsdale v. Dimsdale*, *ubi sup.*

(*t*) *Berdie v. Dawson*, 34 Beav. 603.

(*u*) *Potts v. Surr*, 34 Beav. 603.  
(*x*) *Hartopp v. Hartopp*, 21 Beav. 259.

The question how far a remainderman in tail may, after the death of a tenant in tail, take proceedings to set aside a re-settlement (under which the estate tail was barred) which would have been fraudulent against the tenant in tail himself is discussed in *Bellamy v. Sabine* (y), and the remainderman was held entitled to have the settlement set aside.

In cases of this class the onus of proving fair play is on the person purchasing from the child, and where a tenant for life, protector of the estate, purchased it from the remainderman, it was considered that the proper value of the estate was the value of the estate if sold with the consent of the protector, not only that of the estate if sold without such consent, so as to give only a base fee to the purchaser (z).

(y) 2 Phill. 425. In this case the seller at undervalue had bequeathed the purchase-money to a different person from the remainderman, so that the rights of an

innocent person were injured by the decree.

(z) *Talbot v. Staniforth*, 1 J. & H. 484.

## CHAPTER VII.

### PROMISES IN CONSIDERATION OF MARRIAGE.

Marriage  
good consid-  
eration for  
promise.

As has been already seen, marriage is a highly valuable consideration, and a promise made in consideration of marriage, subject to a certain statutory limitation, may, like any other promise for valuable consideration, be enforced against the person making it.

Effect of Sta-  
tute of Frauds  
and doctrines  
of equity.

Before discussing some of the more minute points arising as to the construction and validity of such promises, it may be well to notice generally the effect of the operation of the statute law on the one hand, and of the doctrines of Chancery, as a court of conscience, on the other hand, as affecting cases of this class. The fact that statute law restricts the efficacy of such promises while the doctrines of equity extend their validity, has the effect of making the subject one of some intricacy, so that, in fact, on the one hand a person may occasionally escape from fulfilling the promises which he has deliberately made by reason of his non-compliance with some statutory requirement not contemplated by any party, and, on the other hand, a person may not unfrequently be obliged to make good representations which he has made, intending, possibly, to fulfil them, but without being aware that they created any binding obligation upon him in law.

Part perform-  
ance.

The statutory restriction imposed upon the validity of promises of the class now treated of is imposed by the Statute of Frauds (*a*). The doctrines of equity applicable to extend the binding character of such promises, and, to

(*a*) 29 Car. 2, c. 3, § 4.

a certain extent, to negative and restrain the operation of the act, are the well-known equitable doctrines of part performance and equitable fraud, applied in accordance with the circumstances of each case. We will first consider what promises are formally valid as being in compliance with the requirements of the Statute of Frauds, as to which, of course, it is unnecessary to go further for reasons in support of their validity, and then go on to consider what promises, though invalidated by that statute, are yet binding in equity, by reason of some part performance by the person seeking to enforce the promise or the fraud (in equity) of the persons sought to be bound.

The fourth section of the Statute of Frauds <sup>Statute of Frauds.</sup> (b) enacts that from and after the 24th day of June, 1677, "No action shall be brought to charge any person upon any agreement upon consideration of marriage, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised." The first point, then, in estimating the legal validity of promises, made in consideration of marriage, is to see whether the terms of the particular promise are in writing and signed as the statute directs, and if this be so, the validity of the promise is *prima facie* established. If, however, <sup>Requisites of valid promise.</sup> there be no sufficient agreement in writing, it will then remain to consider, in the second place, whether the promise forms part of an agreement, of which there has been a part performance, sufficient to take the case out of the operation of the statute; or, thirdly, whether the promise involved statements or representations which the promiser is bound to make good, inasmuch as to do otherwise would amount at least to equitable fraud (c).

By the words of the fourth section of the Statute of Frauds, which we are now considering, the agreement, or

(b) 29 Car. 2, c. 3, § 4.

(c) See *infra*, p. 44.



some memorandum or note thereof, must be in writing and signed; and it is to be observed, that the wording of this section differs slightly from the wording in other sections of the act, for instance, from that in the sixteenth section, the latter being, it is said, less stringent in its provisions (*d*).

What is sufficient memorandum.

As to what constitutes a sufficient memorandum within the statute, it is to be observed that such an agreement need not be of a formal character, and may by the express words of the statute be made by an agent. Thus two letters, written by the direction of the defendant, the wife's father, were held to constitute a sufficient agreement, the marriage forming the consideration (*e*).

Letter may amount to.

And a letter written and sent by the future husband to his wife previously to the marriage, and which contained proposals as to the settlement of the wife's property, partly in favour of her children by a previous marriage, and which was accidentally preserved, was, after the wife's death, made the basis of a settlement of her property come to her husband's hands; and this was so, notwithstanding subsequent post-nuptial arrangements made in the nature of a settlement by the husband and wife, and which ignored the proposals in the letter (*f*).

Meaning of "agreement."

The word used in the section under discussion is "agreement," and a promise in writing is not sufficient, it has been said, if it amount only to an engagement or undertaking (*g*). To constitute an agreement, "there must be the assent of two or more minds . . . so certain and complete that each may have an action upon it" (*h*). And such an agreement in writing, or a note or memorandum

(*d*) Agnew, Stat. of Frauds, p. 227 *et seq.*

(*e*) *Wankford v. Fotherby*, 2 Vern. 321. This case, however, is very meagrely reported.

(*f*) *Luders v. Ansty*, 4 Ves. 501. The decision would probably have been different had the other settle-

ment been ante-nuptial.

(*g*) *Sed quare*.

(*h*) Per Comyns, C. B., cited by Lord Ellenborough in *Wain v. Warlters*, 5 East, 10. But it might really seem this is too strictly verbal an interpretation. See *infra*, note (*l*).

thereof, and signed, there must be, in order to give a cause of action on the consideration of marriage (i); unless, as has been before said, there be part performance or fraud (in equity), to remove the case from the operation of the statute.

This strict construction of the Statute of Frauds on this point has been followed in the more recent case of *Caton v. Caton* (k). In this case, the husband, previously to marriage, wrote out and gave to his wife's solicitors certain proposals as a basis of a marriage settlement in this form: "C. (the husband) to do so and so, and H. (the wife), to have so and so." It was held, on a bill filed by H., that independently of a question of waiver which would probably have been decided in the defendant's favour, H. was not entitled to specific performance of the proposals (l).

Strict construction of statute.

In *Caton v. Caton* (m), the requisites of a signature to satisfy the Statute of Frauds are very carefully considered, and it was laid down (n), that the signature must be so

*Caton v. Caton.*

(i) *Wain v. Warlters*, *ubi sup.* The 17th section of the Statute of Frauds is distinguished from the 4th in this respect, no agreement as distinguished from an engagement or undertaking being necessary in the latter section. *Egerton v. Mathews*, 6 East, 307. And see *Kenworthy v. Schofield*, 2 B. & C. 947; *Sarl v. Bourdillon*, 1 C. B., N. S. 188; 26 L. J., C. P. 78.

(k) L. R., 1 Ch. 137; 34 L. J., Ch. 564; on appeal, L. R., 2 H. L. 127, 140; 36 L. J., Ch. 886; 14 L. T. 34; 14 W. R. 267.

(l) It will be seen, from the cases above cited, that a strict interpretation is put on the agreement in the letter, or what may be called the enabling part of the 4th section; and it seems that it might be argued that, upon a similar construction of the same term in the first or disabling part of the same section, an agreement only amounting to an undertaking or an engagement would not be affected by the statute at all, so that a mere

promise (not amounting to an agreement) might be left to the common rules of law, and, if made for the consideration of marriage, be held valid. This view, however, so far as the author is aware, has never been maintained, and may probably be assumed to be untenable. The Statute of Frauds, which has perhaps as often protected as prevented improper dealing, has been very variously estimated, both as to its policy and the merits of its drafting. It has been said to have been drawn by Lord Hale; but Lord Mansfield, in *Wyndham v. Chetwynd*, says that at most Lord Hale only left some loose notes, which were afterwards unskilfully digested: and perhaps in too minute and literal interpretation, as the words, the spirit of the statute, may sometimes be lost.

(m) *Ubi sup.* And see L. R., *ibid.* p. 143.

(n) By Lord Westbury, approving the language of Sir William Grant in *Ogilvie v. Foljambe*, 3 Mer. 53.

placed as to show that it was intended to relate and refer to every part of the instrument. It must show that every part of the instrument emanates from the individual signing, and the signature was intended to have that effect; and a signature found on an instrument incidentally only, or having relation and reference to a portion only of the instrument, cannot have the legal effect and force which it must have in order to comply with the statute, and to give authority to the whole of the memorandum.

Part performance.

Although there may be no agreement signed sufficiently within the terms of the Statute of Frauds, yet an agreement in consideration of marriage may, like other agreements, be supported, if it be shown that there has been a sufficient part performance in pursuance thereof; for this purpose it is necessary that one of the two contracting parties, and not, of course, the one sought to be charged, has been induced to alter his position on the faith of the contract (o).

Marriage not itself part performance.

The fact, however, itself, of the marriage taking place, is not a sufficient part performance to bring a case within the equitable rule. Marriage, in fact, is not necessary to bring a case within the statute at all, and to hold that it also is sufficient to take the case out of the statute, would be a palpable absurdity (p).

Generally speaking, in order to exclude the operation of the Statute of Frauds, there must be a part performance of

The following cases were cited in *Caton v. Caton*, in favour of the plaintiff, that the signature was sufficient, viz.:—*Hammersley v. De Biel*, 12 Cl. & F. 45; *Ogilvie v. Foljambe*, 3 Mer. 53; *Saunderson v. Jackson*, 2 B. & P. 238; *Mundy v. Jolliffe*, 5 My. & Cr. 167; *Podmore v. Sunning*, 7 Sim. 644; *Wallgrove v. Tebbe*, 2 K. & J. 313; *Ridgway v. Wharton*, 6 H. L. C. 218; *Sheppey v. Denison*, 5 Esp. 190; and the following in opposition, viz.:—*Goss v. Lord Nugent*, 5 B. & Ad. 58; *Stokes v. Moore*, 1 Cox, 219; *Lobb v. Stanley*, 5 Q. B. 579; *Probert v.*

*Parker*, 1 Russ. & My. 625; *Lassence v. Tierney*, 1 Mac. & G. 551; *Jorden v. Money*, 5 H. L. C. 1039; *Glengall v. Barnard*, 1 Keen, 769; and *Thynne v. Glengall*, 2 H. L. C. 131.

(o) Per Cranworth, L. C., in *Caton v. Caton*, L. R., 1 Ch. p. 148.

(p) *Ibid.* And as to what amounts to a part performance, see *Alderson v. Maddison*, L. R., 8 App. Ca. 467; 7 Q. B. D. 174, 178; 43 L. T. 249; and *Nunn v. Fabian*, L. R., 1 Ch. 35; 13 L. T. 34; 11 Jur. 868; 35 L. J., Ch. 140.

some definite agreement, and some consideration for the agreement, and while the fact of marriage is not a part performance, yet it may in itself supply a sufficient consideration.

There is a well-known general principle of equity, that where a representation is made by one party for the purpose of influencing the conduct of the other party, and it is acted on by such other party, the latter may obtain the assistance of the court for the purpose of having such representation made good; at all events where the representation amounts to a legal fraud against the person seeking relief. This principle is doubtless applicable to representations made in contemplation of marriage, though it is necessary always to bear in mind as above stated, that the fact of the marriage is not in itself a sufficient acting upon the representation to raise the equity (*g*).

Representa-  
tion on mar-  
riage.

It has been laid down, however, that if one person holds out inducements to another plainly and deliberately, and such other person marries on the faith thereof, the court will enforce performance of the promise (*r*).

But the promise may be waived by the acceptance of other conditions in a formal ante-nuptial settlement (*s*), and it must be shown that the marriage took place in reliance on the promise (*t*).

And in cases of fraud, equity will give relief even against Fraud. the words of the statute, for instance, if one agreement in writing should be proposed and drawn up, and another fraudulently and secretly brought in and executed in lieu of the former, in this and such like cases of actual fraud equity would relieve; but where there is no fraud, only

(*g*) *Hammersley v. De Biel*, 12 Cl. & F. 62 (*n*); *Loffus v. Maw*, 3 Giff. 603; *Jorden v. Money*, 5 H. L. C. 185; *Richard v. Sears*, 6 A. & E. 469; *Chamberlaine v. Chamberlaine*, Freem. Ch. R. 34; *Stickland v. Aldridge*, 9 Ves. 516. And see *Dashwood v. Jermyn*, L. R., 12 C. D. 776; 27 W. R. 868.  
(*r*) *Kay v. Crook*, 3 Sm. & G. 407.  
(*s*) *Loxley v. Heath*, 1 De G., F. & J. 489; 27 Beav. 523.  
(*t*) *Goldicutt v. Townsend*, 28 Beav. 445. As to the non-communication of the promise, see *Ayliffe v. Tracey*, 2 P. W. 65.

relying upon the honour or promise, equity will not relieve (u).

Representa-  
tion on mar-  
riage.

As has been already seen, promises made on the occasion of a treaty for marriage to either party are binding (if the marriage take place on their faith), upon the parties making them, and the fact of the marriage, though it is not good as a part performance, supplies a good consideration for the purpose on the part of the person to whom the promise is made. The rule, indeed, appears to depend on the large principle, that when a man makes a representation to another in consequence of which that other person contracts engagements or alters his position, or is induced to do any other act which either is permitted or sanctioned by the person making the representation, the latter cannot withdraw from the representation, but is bound by it conclusively. A principle which applies in the fullest extent to cases of this kind (x).

Must not be  
too vague.

The promise or representation, however, must not be of two vague or general a character. It must be sufficiently definite for a court to be able to say what it is that has been contracted for. It is sufficient, however, if the thing promised, though not stated in terms, can be sufficiently inferred from the circumstances. Thus, where a father, on the occasion of the treaty for his daughter's marriage, wrote as follows:—"I will still adhere to my last proposition, viz., to allow Elizabeth 100*l.* per annum, and that at my decease she shall be entitled to her share in whatever property I may die possessed of," the letter was held to be sufficiently definite to constitute a binding contract (y).

Expression  
"her share."

In this case the father died possessed of both personalty

(u) *Montacute v. Maxwell*, 1 P. W. 620. But see *Dashwood v. Jermyn*, *ubi sup.*

(x) Per Bacon, V.-C., in *Coverdale v. Eastwood*, L. R., 15 Eq. 121, 131; 42 L. J., Ch. 118; 27 L. T. 646; 21 W. R. 216. See also, on the subject, *Loxley v. Heath*, 27 Beav. 523; 1 De G., F. & J. 489;

*Bold v. Hutchinson*, 20 Beav. 250; 5 De G., M. & G. 558; *De Biel v. Thompson*, 3 Beav. 469; 12 Cl. & F. 45; *Barkworth v. Young*, 4 Drew. 1; and *Goldicutt v. Townsend*, 28 Beav. 445. And cf. *Dashwood v. Jermyn*, L. R., 12 C. D. 776; 27 W. R. 868.

(y) *Laver v. Fielder*, 32 Beav. 1.

and realty, and leaving a widow, a son, and the daughter above referred to, and it was held, that the expression "her share" in the letter was sufficiently explicit, as it legally meant, in the state of the family, one-half of two-thirds of the personalty of the parent.

In the consideration of the case much importance was given to the exact expression "her share," and it was intimated that had the wording been "a share" only it would have been too ambiguous to be enforced. And it is also to be noticed, that there being a son, the daughter was held not to be entitled to any part of the realty, as she would have had no share of it in case of an intestacy.

Similarly in *De Biel v. Thompson* (s), a father, in his proposals on the marriage of his daughter, stated that "he also intended to leave her a further sum of 1,000*l.*," and this sum was accordingly decreed to be paid out of his estate on his decease. Definite sum.

On the other hand, a statement, by the wife's father, was as follows:—"You may assure the young gentleman that on his marriage he shall have 2,000*l.* sterling; nor will that be all, she is and shall be noticed in my will, but to what further amount I cannot precisely say," was not held to be binding except as to the 2,000*l.*; the rest of the letter being too indefinite to be enforced (a). So, also, a promise to "recognize" a son in a will is too vague (b). Indefinite promise.

It remains to add, that there must be a connection between the promise or representation and the marriage or consent thereto. A gratuitous promise by A. to B., whereby C. consents to a marriage, does not appear to give any claim against A. (c).

(s) 3 Beav. 469; 12 Cl. & F. 45.

(a) *Moorhouse v. Colvin*, 15 Beav. 351.

(b) *Kay v. Crook*, 3 Sm. & Giff. 407.

(c) *Dashwood v. Jermyn*, L. R., 12 C. D. 776; 27 W. R. 868.

## CHAPTER VIII.

## THE WIFE'S EQUITY TO A SETTLEMENT.

Wife's equity  
to settlement.

IN cases where a married woman has a present title to property, which is not already in her possession or in that of her husband, she has an equitable right previously to the reduction thereof into possession by herself or her husband, to require that a sufficient part of it should be settled upon her. It is to be observed, however, that the importance of this branch of equitable jurisdiction will become less and less important under the operation of the Married Women's Property Act, 1882 (*a*). The jurisdiction seems founded on the principle expressed by Lord Rosslyn in *Oswell v. Probert* (*b*), that whatever a husband takes in right of his wife is in itself a provision for both. This equitable jurisdiction is a very old one. Thus, in *Sturgis v. Champneys* (*c*), it is said that the time cannot be found when the court did not exercise this jurisdiction.

Extensive  
nature of  
right.

As this right has been long established, so also is it extensive as to subject-matter. It comprises not only personal property, but extends to real estate (*d*), and not only to absolute interests in either, but to life or other limited interests of the wife (*e*), if immediate, and not

(*a*) 45 & 46 Vict. c. 75. See Appendix.

(*b*) 2 Ves. 680. See *Ball v. Montgomery*, 4 Bro. C. C. 338; *Brown v. Clark*, 3 Ves. 166, 168.

(*c*) 5 My. & Cr. 97. *Sir Edward Turner's case* is one of the earliest, a decree therein on this principle being found in the Lords' Journals of 1680. See 1 Vern. 7. A similar decree was made in 1692. See *Tudor v. Samyne*, 2 Vern. 270.

And see *Knight v. Knight*, L. R., 18 Eq. 487; 43 L. J., Ch. 611; 22 W. R. 792.

(*d*) *Hansom v. Keating*, 4 Ha. 1; *Burdon v. Dean*, 2 Ves. 607.

(*e*) *Taunton v. Morris*, L. R., 8 C. D. 453; 47 L. J., Ch. 721; 38 L. T. 552; 26 W. R. 674; *In re Bryan*, L. R., 14 C. D. 516; 49 L. J., Ch. 504; 42 L. T. 582; 28 W. R. 761; *Pryor v. Hill*, 4 Bro. C. C. 139.

reversionary, and the jurisdiction extends to an equitable estate in fee descending on a married woman under an intestacy (*f*): but it seems it does not extend to an equitable estate tail of the wife (*g*); and where there is a covenant by the husband to settle after-acquired property of the wife specially, excepting a particular fund, then the rule may not extend to such fund (*h*); and the wife is not entitled to a settlement out of an annuity of which she and her husband are tenants by entireties (*i*). The jurisdiction is also extensive, in the sense that interests are readily considered to be equitable; for instance, where there is a legal interest in chattels real without the right of possession. Thus, the fact that a jointure term was outstanding in trustees, was considered to make the estate equitable (*k*).

It has often been stated that the principle upon which the jurisdiction of equity vests in this case is the well-known one that he who seeks equity must do equity; but although this may be one ground of the jurisdiction, so that a wife, where the husband is plaintiff, may take full advantage of the principle (*l*), yet it is not the sole ground, and a wife is consequently entitled to come into equity, and actively assert her right in an action in which she is herself plaintiff (*m*). And she has been allowed to sue *in formâ pauperis* where her husband was bankrupt, to assert her right to a settlement of her equitable estate for life in realty (*n*).

Principle of  
the equity.

A married woman, entitled to a share of a fund in court, is entitled after judgment in an administration action, but

(*f*) *Smith v. Matthews*, 3 De G., F. & J. 139.

(*g*) *Life Association of Scotland v. Siddall*, 3 De G., F. & J. 271.

(*h*) *Brookes v. Hicks*, 12 W. R. 703.

(*i*) *Ward v. Ward*, L. R., 14 C. D. 506; 49 L. J., Ch. 409; 42 L. T. 523; 28 W. R. 963.

(*k*) *Wortham v. Pemberton*, 1 De G. & S. 644.

(*l*) *Sturgis v. Champneys*, 5 My. & Cr. 97.

(*m*) *Elibank v. Montolieu*, 5 Ves. 737; *Wortham v. Pemberton*, 1 De G. & S. 644.

(*n*) *Barnes v. Robinson*, 32 L. J., Ch. 143.



How far  
equity ex-  
tends to chil-  
dren.

before further consideration to have her equity enforced, though the amount of the share is not ascertained (o).

The equity is purely personal to the wife, but the court always makes provision in the settlement for the children of the then present or any future marriage, on the presumption that it is the mother's wish (p), and this irrespectively of the fact, if it be so, that they are otherwise provided for (q). But it may be otherwise if the mother object, as the court only assumes the jurisdiction against the father, and as between the mother and children the court will not take anything away from the mother unless it seems to be with her consent (r).

The equity of the children, indeed, is not one to which they are in their own right entitled, and the court consequently will not interfere in their behalf originally (s).

Benefit of de-  
cree extends  
to children.

If, however, the mother has obtained a decree for a settlement, and then die, in that case the children may claim the benefit of the decree in their own favour (t), unless the wife has done some act to waive her equity (u).

But should it be that the wife has only claimed the fund, and not expressly claimed settlement, such claim may not be sufficient to give the children any interest after her death (x). And until the final order for a settlement has been made, the wife has power to abandon the proposed settlement (y).

(o) *In re Robinson's Settled Estate*, L. R., 12 C. D. 188; 48 L. J., Ch. 507; 27 W. R. 781.

(p) *Hodger v. Hodger*, 11 Bli. 104; *Spirett v. Willows*, L. R., 4 Ch. 407; 17 W. R. (Dig.) 155.

(q) *Conington v. Gilliat*, 25 W. R. 69.

(r) *Hodger v. Hodger*, 11 Bli. 104.  
(s) But see *Walford v. Gray*, 13 W. R. 335, 761.

(t) *De la Garde v. Lempriere*, 6 Beav. 344, 345; *Groves v. Clark*, 6 Sim. 584; *Lloyd v. Mason*, 5 Ha. 149.

(u) *Murray v. Lord Elibank*, 13 Ves. 1; *Fenner v. Taylor*, 2 Russ. & My. 190.

(x) *De la Garde v. Lempriere*, ubi sup., p. 346. And see *Steinmetz v. Halkin*, 1 Glyn & J. 64; *Lloyd v. Williams*, 1 Madd. 450; *Hodgers v. Hodgers*, 11 Bli., N. S. 620; and *Wallace v. Auldjo*, 1 De G., F. & S. 643.

(y) *Baldwin v. Baldwin*, 5 Dr. & Sm. 317; *Barrow v. Barrow*, 4 K. & J. 409, 424; *Heath v. Lewis*, 13 W. R. 129.

The court has power of itself to order a settlement to be made of the property of married women who are infants, where they are wards of court, but not otherwise (z).

Where money is in the hands of bankers, or third persons generally, the question may of course arise, whether it has or not been sufficiently reduced into the possession of the husband to exclude the wife's equity. The principle seems to be, that this will depend upon the question whether or no the funds have ever been so placed, that the husband could at any time have brought an action against any person for them, or for money had and received for his own use (a).

What is a reduction into possession.

The wife, however, has no equity to a settlement out of a fund representing arrears of income which the husband was entitled to receive in right of his wife. The wife may, it is true, have an equity to intercept cash payment, but unless and until the right is set up the payments belong to the husband for his own benefit (b).

No equity as to arrears of wife's income.

The wife's equity is good not only against the husband himself but also, as a rule, against his assigns, whether in bankruptcy or as purchasers.

It is settled, that the purchaser for value from the husband, of the wife's chose in action to the corpus of which she is entitled, is in no better position as regards her equity than is the husband (c).

But the rule does not prevail against a particular assignee of a life interest of the wife. If the question relates to a mere life estate, and if previously to the assign-

Purchaser from husband.

(z) *In re Potter*, L. R., 7 Eq. 484; *Powell v. Oakley*, 34 Beav. 576; *Worham v. Pemberton*, 1 De G. & Sm. 644. And see *S. C. Infants' Settlement Act*.

(a) Per James, V.-C., in *Aitchison v. Dixon*, L. R., 10 Eq. 598; 39 L. J., Ch. 705; 23 L. T. 97; 18 W. R. 989. And see *Ex parte Norton*, 25 L. J., Bkcy. 43; *Sturgis v. Champneys*, 5 My. & Cr. 97; *Bond v. Simmons*, 3 Atk. 20; *Burdon v.*

*Dean*, 2 Ves. 607; and *Blount v. Bestland*, 5 Ves. 615. And see *infra*, p. 54.

(b) *In re Carr's Trusts*, L. R., 12 Eq. 613; 40 L. J., Ch. 353; 19 W. R. 676; *Tidd v. Lister*, 3 D., M. & G. 857; *Life Association of Scotland v. Siddal*, 3 D., F. & J. 271.

(c) Per Cranworth, L. C., in *Tidd v. Lister*, 3 D., M. & G. 857; and see *Franco v. Franco*, 4 Ves. 515.

ment by the husband there has been no failure on the part of the husband to maintain his wife, the court will not, it seems, go so far as to allow the wife any interest (*d*).

And so, in *Elliott v. Cordell* (*e*), where a legacy of the dividends of 900*l.* bank annuities was given to the wife during her life, and husband and wife joined in a sale of the life interest, and the husband afterwards became bankrupt, it was held that the purchaser was not liable to make provision for a settlement, though the husband could have been himself so liable on his bankruptcy; and Sir John Leach expressed his opinion, that there was no authority for the equity claimed against a particular assignee in the case of an interest given to the wife for life, and that it did not follow as a corollary of any established doctrine of the court.

Trustee in  
bankruptcy.

In bankruptcy, however, it is different, and the wife's equity will prevail on the ground seemingly, that when the title of the assignee or trustee vests, the incapacity of the husband to maintain his wife has already raised the equity (*f*).

Wife's equity  
in discretion  
of court.

The question, however, whether a wife should be allowed any settlement at all is entirely one for the discretion of the court, even as against the trustee in bankruptcy of the husband; and where the wife has a competent separate maintenance, provided from other sources, it is possible that she may be considered not entitled to any settlement (*g*), though it is conceived that rather a strong case is required to disentitle her entirety to such equity, and the conduct of

(*d*) *Stanton v. Hall*, 2 Russ. & My. 175.

(*e*) 5 Madd. 149. And see *Lumb v. Milnes*, 5 Ves. 517; and cases cited; *Brown v. Clark*, 3 Ves. 166; and *Jacobs v. Amyatt*, 1 Madd. 276 (*n*).

(*f*) *Elliott v. Cordell*, *ubi sup.* And see also, as to the difference in this respect between the general and particular assignee of the husband, *In re Carr's Trusts*, L. R., 12 Eq. 609; 40 L. J., Ch. 353; 19

W. R. 675; *Tidd v. Lister*, 3 D., M. & G. 857; *Life Association of Scotland v. Siddal*, 3 D., F. & J. 271; *Stanton v. Hall*, 2 Russ. & My. 175; and *Hale v. Edmonds*, 5 De G. & Sm. 603.

(*g*) *Giacometti v. Prodgers*, L. R., 14 Eq. 253; 27 L. T. 470; on appeal, L. R., 8 Ch. 338; 28 L. T. 432; 21 W. R. 375; *Spicer v. Spicer*, 24 Beav. 365; *Aguilar v. Aguilar*, 5 Madd. 414; and *In re Erskine's Trusts*, 1 K. & J. 302.

the husband under the circumstances of each case, for instance, whether he is maintaining his wife, or is willing so to do, will be considered in such cases (*h*).

The proportion of the fund to be settled is also a question for the discretion of the court. Formerly it was supposed, that it was the rule of the court to divide the fund equally between the husband on the one side, and the wife and children on the other (*i*). But the rule has been relaxed, and considerable latitude in apportioning the amount was assumed by the court (*k*). In *Spirett v. Willows* (*l*), the court settled three-fourths, and in *Carter v. Taggart* (*m*), two-thirds.

Proportion of fund to be settled.

In *Taunton v. Morris* (*n*), on appeal from a decision of Malins, V.-C., whereby the whole of a married woman's life interest was settled upon her, the husband being insolvent, Brett, L. J., affirming the decision of the Vice-Chancellor, said as follows:—"The principle of the courts is one which we cannot but admire, that a settlement should be made of the wife's property. But in the course of time an artificial rule for carrying it out has been made, under which a certain proportion only is given to the wife. In modern times this artificial rule has fallen through; several cases had been cited in which the whole of the wife's property was settled, no distinction being taken in them between corpus and income. The modern rule seems to be, that all the circumstances of the case should be looked at, and that the judge should exercise his judicial discretion as to the amount to be settled. Such circumstances are the amount of the property in question, the amount of the husband's debts, and the length of time since the insolvency. In the present case,

No fixed rule.

(*h*) *Giacometti v. Progers*, *ubi sup.*

(*i*) *Bereaford v. Hobson*, 1 Madd. 362; *Napier v. Napier*, 1 D. & War. 407.

(*k*) Per Cairns, L. C., in *In re Suggitt's Trusts*, L. R., 3 Ch. 217.

(*l*) L. R., 1 Ch. 520; 17 W. R. (Dig.) 155.

(*m*) 5 De G. & Sm. 49.

(*n*) L. R., 11 C. D. 779; on appeal, see S. C., 8 C. D. 453; 47 L. J., Ch. 721; 38 L. T. 552; 26 W. R. 674. And see *De Martana v. De Martana*, 24 W. R. 200.

I think, the length of time since the insolvency (*o*) renders it quite an exceptional case. If it was not for the debts being kept alive by the insolvency all the husband's debts would have been barred by lapse of time, and, doubtless, in fact, all have long ago been written off by the creditors as bad debts. Another thing to be considered is the amount of the property. If it had been an income of 1,000*l.* a year the Vice-Chancellor's decision, probably, might have been different . . . all things must be considered in applying the principle of the Courts of Equity."

When whole  
fund settled.

The whole of the fund will, as a rule, be settled only in some one of the following cases, namely, where the husband is unable or unwilling to maintain his wife; where he has already received a considerable part of the fund; or where the fund is so small that it is not worth the trouble and expense of division.

To deprive a husband of all right to any portion of the fund on the first ground alone, the husband must be actually insolvent, or have deserted his wife (*p*); but the fact that he is living apart from her is not in itself a sufficient reason if he has not been guilty of misconduct (*q*).

Small sums.

In the second case, where the husband has already received a large amount, the whole of the residue may be settled (*r*). Another case, where the settlement may extend to the whole fund, is in the case of very small sums. On this point it appears that a married woman has an equity to a settlement, however small the fund may be. It was, indeed, formerly considered otherwise (*s*), on the ground chiefly, that as a rule of practice a sum of less than

(*o*) Fifteen years.

(*p*) *In re Suggitt's Trusts*, L. R., 3 Ch. 215; *Giacometti v. Prodgers*, L. R., 8 Ch. 338; 28 L. T. 432; 21 W. R. 375; *Brett v. Greenwell*, 3 Y. & C. Ex. 230; *Gilchrist v. Cator*, 1 De G. & S. 188; *In re Cutler*, 14 Beav. 220; *Francis v. Brooking*, 19 Beav. 347; *In re Kincaid's Trusts*, 1 Drew. 326; *Dunkley v. Dunkley*,

2 D., M. & G. 390.

(*q*) *In re Suggitt's Trusts*, *ubi sup.*

(*r*) *Scott v. Spashett*, 3 Mac. & G. 599; *Ward v. Yates*, 1 Dr. & Sm. 80; *Gardner v. Marshall*, 14 Sim. 575; *Nicholson v. Carlisle*, 22 W. R. 820.

(*s*) *Bourdillon v. Adair*, 3 Bro. C. C. 237.

200*l.* will be paid out of court without the separate examination of a married woman, her consent being in fact taken for granted (*t*). This presumption of consent is however, of course, rebutted if the wife insist upon a settlement, and she is entitled to have a settlement accordingly; and further, inasmuch as it is not worth while to divide a small amount, she is entitled to have the whole sum settled (*u*).

If, however, a married woman is liable for ante-nuptial debts, she is not entitled to any equity to a settlement till they are paid (*x*); and, generally, anything in the nature of fraud on the part of a married woman will prevent her setting up her equity (*y*); and no equity in favour of a woman arose where her husband, as a defaulting executor, was disentitled to receive a part of her share (*z*).

Cases of fraud.

It is now settled, that the right of the wife should not be varied further than will suffice to let in the equity of the wife and children; and, therefore, where the fund is not reversionary, and the husband has, therefore, subject to the equity, a right to reduce it into possession, the ultimate limitation of the settlement should be to the husband or his incumbrancer (if he has encumbered) absolutely, whether the husband survive the wife or not. The point seems to have been so decided by Lord Cranworth in *Carter v. Taggart* (*a*), though down to the date of that decision a practice had crept in of giving the wife a general power of appointment in default of children, or of making the limitation to the husband contingent upon his surviving his wife. The form of ultimate limitation in a settlement made by the court of property subject to a wife's equity, is, after the death of the wife, and failure of

Ultimate limitation given to husband.

(*t*) *Re Kincaid*, 1 Drew. 326.

(*u*) *Re Kincaid*, *ubi sup.*; *Foder v. Finney*, 4 Russ. 428; *Re Cutler*, 14 Beav. 220; *Re Merriman's Trusts*, 10 W. R. 334; and see *In re Cordwell's Estate*, L. R., 20 Eq. 644; 44 L. J., Ch. 746; *Osborne v. Morgan*, 9 Ha. 432.

(*x*) *Barnard v. Ford*, L. R., 4 Ch. 247; 20 L. T. 289; 17 W. R. 478.

(*y*) *In re Lush's Trusts*, L. R., 4 Ch. 591; 17 W. R. 974.

(*z*) *Knight v. Knight*, L. R., 18 Eq. 487; 43 L. J., Ch. 611; 22 W. R. 792.

(*a*) 1 D., M. & G. 286.

children of her then present or any future marriage, for the benefit of the husband whether he survive the wife or not (b).

How far right of husband to be ousted.

Lord Chelmsford in *Spirett v. Willows* (c), Vice-Chancellor James in *Croxton v. May* (c), and Lord Cairns in *In re Suggitt's Trusts* (c), have all held it inconsistent with the husband's rights to interfere with the fund more than is necessary in the interest of the wife and children, and that to give a general power of appointment to the wife goes beyond what is necessary. In the yet later case of *Walsh v. Wason* (c), Lord Selborne held, upon the same principle, that it would go beyond the necessity of the case to place the fund in the position of a reversionary interest by making the limitation to the husband (in default of children) contingent upon his surviving his wife, but the settlement should contain a power of appointment by the wife by will or deed amongst the children prior to the limitation to them (d). The wife will lose her right to a settlement if the property be reduced into possession by the husband, either actually or constructively. Actual receipt of the funds is, of course, a sufficient reduction into possession by the husband to exclude the wife's right (e). And any transfer to the husband or his assignee, so as to vest the absolute control over the fund, appears sufficient (f).

What is a reduction into possession by husband.

But a legacy is not sufficiently reduced into possession by the appropriation by the executrix of a mortgage of the same amount to satisfy it, as the wife must have been a party to sue for it (g), and the conveying over of a fund to the account of the husband and wife in an action is not a

(b) *Walsh v. Wason*, L. R., 8 Ch. 482; 42 L. J., Ch. 676; 28 L. T. 457; 21 W. R. 554; *Croxton v. May*, L. R., 9 Eq. 404; 39 L. J., Ch. 155; 22 L. T. 457; 21 W. R. 554; *Spirett v. Willows*, L. R., 1 Ch. 520; 4 Ch. 407; *Carter v. Taggart*, *ubi sup.*; *In re Suggitt's Trusts*, L. R., 3 Ch. 315.

(c) *Ubi sup.*

(d) *Oliver v. Oliver*, L. R., 10

C. D. 765; 48 L. J., Ch. 630; 27 W. R. 657.

(e) *Boswell v. Earle*, 12 Ves. 473; *Ryland v. Smith*, 1 My. & Cr. 53; *Re Jenkins*, 5 Russ. 183.

(f) *Harrison v. Andrews*, 13 Sim. 595; *Tidd v. Lister*, 3 De G., M. & G. 871.

(g) *Wollaston v. Berkeley*, L. R., 2 C. D. 213; 45 L. J., Ch. 772; 34 L. T. 171; 24 W. R. 360.

reduction into possession by the husband (*h*). But a sale by the husband of the wife's chattels, and receipt by him of the purchase-money, is a clear reduction into possession (*i*).

It remains to add, that a trustee or executor is not bound himself to assert a married woman's equity to a settlement, but is at liberty to pay over her funds to her husband if he think fit (*k*). Trustee need not assert equity.

It remains further to add, that a married woman can, by deed acknowledged, effectually release to a purchaser her right to an equity to a settlement (*l*).

It remains to repeat, that much of the law stated in the present chapter will be no longer applicable since the passing of the Married Women's Property Act, 1882 (*m*). Effect of Married Women's Property Act. At all events, as regards those married women who have married since that act came into operation, and the effect of that act, and of the previous statutes incorporated therewith, should be carefully considered in future in all cases where a married woman's interest in property is concerned.

(*h*) *Prole v. Soady*, L. R., 3 Ch. 220; 17 L. T. 485; 16 W. R. 295.

(*i*) *Widgery v. Tepper*, L. R., 5 C. D. 516; 7 C. D. 423; 47 L. J., Ch. 550; 38 L. T. 434; 26 W. R. 546. And see further, on the subject generally, Dav. Conv. 4th ed. vol. 2, pt. 1, pp. 226 *et seq.*

(*k*) *Boswell v. Earle*, 12 Ves. 473, 475; *Glaister v. Hewer*, 8 Ves. 195, 206.

(*l*) 20 & 21 Vict. c. 57 (Malins' Act). For form of release, see *Prideaux*, vol. 1, p. 393; and see *Cooke v. Williams*, 4 W. R. 504.

(*m*) 45 & 46 Vict. c. 75; see Appendix.



## CHAPTER IX.

## SETTLEMENTS BY THE COURT.

KINDRED to the subject discussed in the preceding chapter is the consideration of the nature of the settlement upon marriage, directed by the Chancery Division of the court, in cases where it is called upon to direct such a settlement. Where a ward of court marries, the court will take care that a proper settlement of her property is made (a).

Marriage  
with consent  
of court.

When the marriage takes place with the consent of the court the settlement will be made on the application of the parties, and will contain all usual provisions in favour of the wife, husband and children. Where the marriage takes place without the consent of the court—an event which in itself involves the commission of a contempt of court—a settlement of greater strictness may be made, so as to exclude more or less completely the interest of the husband. The jurisdiction of the court, in the latter case, is founded on the contempt exhibited by the conduct of the husband in marrying a ward of court without consent (b); an offence which varies greatly in importance,

Marriage  
without con-  
sent, a con-  
tempt of  
court.

(a) The Queen, as *parens patriæ*, has a jurisdiction over the estates and persons of infants, which jurisdiction is now exercised through the Chancery Division of the High Court of Justice, in succession to the old Court of Chancery, to which the jurisdiction had fallen on the cessure of the old Court of Wards. "It is not a profitable jurisdiction of the Crown, but for the benefit of the infants themselves, who must have some common parent." Per Lord Hardwicke, in *Smith v. Smith*, 3 Atk. 305.

(b) Such a marriage is a punishable contempt, and is only condoned (amongst other things) by a proper settlement being made. "If he (the husband) refuses, I will send him back to the Fleet, and there talk to him about it." Per Lord Thurlow, in *Stackpoole v. Beaumont*, 3 Ves. 98; and see *Martin v. Foster*, 7 D., M. & G. 98. The pendency of a suit relative to the property of an infant renders him a ward of court, and so does any order of the court, which has the effect of putting the parties in the same position

and which may be simply a technical and venial error, or one of a serious nature, according to the circumstances of each case.

In all cases connected with the marriage of a ward of court, the court acts by way of analogy to the care and prudence of the natural parent (*c*); and where no serious misbehaviour has occurred on the part of the intending husband, the court will give sanction to any arrangement which a prudent father would approve (*d*).

Where the marriage takes place with the consent of the court, the initiative is taken by the parties themselves, and the settlement, though it must be approved by the court, will usually be of the same character as one made out of court by the same parties, and under similar circumstances, as to the arrangement of the life interests in the funds (*e*), and as to the ultimate trusts (*f*), and otherwise.

Where the marriage takes place without the consent of the court, the husband will be punished (in proportion to his misconduct) by more or less rigorous exclusion from participation in the enjoyment of the property (*g*).

as if an action was commenced. Payment into court of money belonging to an infant under the Trustee Relief Act makes the infant a ward of court. *In re Hodges' Settlement*, 3 K. & J. 212. And so does an order for maintenance of an infant without suit. *In re Graham*, L. R., 10 Eq. 530; 19 W. R. 951. But payment into court of money of an infant under the Legacy Duty Act, or the Lands Clauses Act, does not make the infant a ward. *In re Hillary*, 2 Dr. & Sm. 461; *Ex parte Brewer*, 2 Dr. & Sm. 552.

(*c*) Per Lord Hardwicke, in *Smith v. Smith*, 3 Atk. 305.

(*d*) *Martin v. Foster*, 7 D., M. & G. 102; Dav. Prec. vol. 3, part 2, p. 655.

(*e*) It is the usual practice where there is no great disparity of fortune, for the husband and wife to

take a first life interest in their own property, except where it is desirable (by reason that the husband is in trade or otherwise) to give the first life interest on the husband's property to the wife, that it may acquire the protection of inalienability; or, less frequently, where it is desired that the husband should take the first life interest in a landed estate belonging to the wife, or part of it, to enable him to maintain an influential position. See Dav. Prec. vol. 3, part 1, pp. 68—72; Pridaux, vol. 2, p. 172.

(*f*) As to the usual ultimate trusts, see Dav. Prec. vol. 3, part 1, p. 182; Pridaux, vol. 2, p. 175.

(*g*) The fact that a venial contempt of court has been committed by the husband will not prevent a settlement being made of a nature favourable to him. In *Stevens v.*

Initiative by parties.

*Like v. Beresford.*

Thus, in some circumstances, the fund may be given to the separate use of the wife, with remainder to her children, with a power to give part of the income to the husband, if he survive, for life (*h*). In *Like v. Beresford* (*i*), where the husband had eloped with a ward, the first life estate was given to the wife in her fortune, and after her death one moiety of the income was given to the husband and the other in trust for the children, with remainder on the death of the survivor to the children as the wife should appoint, with remainder, in default of children, if the husband survived, according to the appointment of the wife, and in default of appointment to the executor of the husband.

Jurisdiction of court to punish contempt.

This particular branch of jurisdiction has been said to be exercised by way of punishment on such as have done any wrong act to the prejudice of infants (*k*), but it is probable that the courts now, in dealing with such cases, will not be solely actuated by vindictive feelings, but will rather endeavour to consult only the real interests of the ward.

Upon the marriage of a ward of court under flagrant circumstances (*l*), Lord Eldon would not approve a proposal for a settlement giving the husband any interest except under his wife's will, and in case of his surviving her and there being no children; and in gross cases of contempt a direction may be inserted in the decree, which directs a settlement to the effect that all the fortune of the infant is to be settled as strictly as in law or equity, in any view of the case it possibly can, or with such other

*Savage*, 1 Ves. 155, the husband was even given the first life interest in the wife's money, she having some other separate provision.

(*h*) *Chassaing v. Parsonage*, 5 Ves. 19.

(*i*) 3 Ves. 510.

(*k*) Per Lord Hardwicke in *Smith v. Smith*, 3 Atk. 305.

(*l*) *Millet v. Rowse*, 7 Ves. 419.

In this case the husband obtained a marriage licence upon a false oath that the ward, then aged fourteen, was of age. The clergyman was ordered to attend, and was reprimanded, and the husband was committed and ordered to be indicted, and he was thereupon convicted, and suffered the penalty of the pillory and imprisonment.

special provisions as the case may require, and a settlement is prepared in chambers accordingly (*m*).

The fact that the wife consents to waive any settlement, while she is still a ward of court, will not prevent the court insisting upon it (*n*); and after a settlement has been prepared, or even proposals for a settlement entertained, the court will not permit a ward and her husband, by waiting until the ward attains her age of twenty-one years, to evade the settlement (*o*).

Waiver of settlement by ward not allowed.

Where the bulk of the property moves from the lady, it is usual to pay attention to the possible interests of a second husband, and of the children of a second marriage (*p*), and a power or trust may properly be inserted with a view to make provision accordingly. This is specially the case where the husband has committed a contempt of court by running away with a ward (*q*). The rule, however, is one of more general application, and not limited to cases where the husband has been in the wrong; and though most reported cases, where such a power has been inserted, are cases either of gross inequality of fortune or of misbehaviour on the part of the husband, yet the principle, as laid down, is probably more extensive. Indeed, as regards all settlements, where considerable property is brought into settlement by the wife, or on the part of the wife's friend, and, especially, where there is contained an agreement for the settlement by her of all her after-acquired property, it seems only right that she should have a power to liberate

Power to appoint in favour of a second husband.

(*m*) For various forms of decree, see Seton, vol. 2, pp. 727—732. A husband committed for contempt is not usually confined till he executes the settlement, but is generally released on an undertaking to execute it. Cf. *In re Sampson and Wall*, L. R., 25 C. D. 482.

(*n*) *Stackpole v. Beaumont*, 3 Ves. 98.

(*o*) *Hobson v. Ferraby*, 2 Col. 412; *Money v. Money*, 3 Drew. 256.

(*p*) Per Lord Eldon in *Halsey v. Halsey*, 9 Ves. 472; and see *Wells v. Price*, 5 Ves. 398.

(*q*) "Where a young woman is run away with, I will never consent to tie her up to that marriage." Per M. R., in *Winch v. James*, 4 Ves. 386. And see also *Millet v. Rowse*, 7 Ves. 419 (a flagrant case of contempt); and *Chassaing v. Parsonage*, 5 Ves. 15 (also a gross case).

Extent of  
power.

part of the funds from the particular settlement in the event of her making a second marriage, or even generally (*r*). The extent of this power will vary according to the particular circumstance of each case; it may be made exerciseable generally, or only upon a future marriage, and may apply to a fixed sum or share of the trust funds, or to a share varying with the number of children of the first marriage (*s*).

It is the modern practice to provide for this object by means of powers reserved to the wife, and not by trusts. In *Halsey v. Halsey* (*t*), Lord Eldon, indeed, disapproved of making this provision in the case of the real estate of a minor by means of a power, on the ground that the minor might lose her husband and marry again before she attained the age of twenty-one years, and there would be a difficulty in her exercising a power over real estate during infancy; but this objection would, probably, now be considered to savour of over-caution, and not be considered of practical importance (*u*).

Usual clauses  
in settlements.

As has been already seen, in the case of settlements made on the marriage of wards of court, or under the Infants' Settlement Act, the proposals for the settlement are usually made by or on behalf of the parties themselves, and the court only interferes to prevent the insertion of provisions of an improper character. Under these circumstances it is hardly surprising to find that there is little direct case authority to show what exactly is the nature of the settlement which the court will make *mero motu*, and in the absence of abnormal circumstances. A leading case on the subject is the case of *Spirett v. Willows* (*x*).

*Spirett v.*  
*Willows.*

In this case, which was one of the settlement of money, the property of the wife, Lord Hatherley (*y*) said, that the power of investment ought to be confined to those securities

(*r*) Dav. Prec. vol. 3, pt. 1, p. 221; Pridaux's Prec. vol. 2, p. 218 (*n*); and see *Rudge v. Winnall*, 11 Beav. 98.

(*s*) Dav. Prec. vol. 3, pt. 1, p. 221.

(*t*) 9 Ves. 472.

(*u*) And see Dav. Prec. vol. 3, pt. 1, p. 656.

(*x*) L. R., 4 Ch. 407.

(*y*) Then Sir Page Wood, L. J.

on which cash, under the control of the court, might be invested (z). In this case, in the settlement made by the direction of the court, the trusts declared were for the married lady for life for her separate use, free from the control of any husband, with a restraint on anticipation. Then followed a power of appointment to all or any of her issue by any husband living at the date of the settlement (a), such issue to be born during her lifetime, or the life of such husband, or within twenty-one years after the death of the survivor; and, in default of appointment, the funds were to be held in trust for all her children, or any her child, who, being sons or a son, should attain twenty-one years, or being daughters or a daughter, should attain that age or marry under that age. Then followed a clause, providing that if any such child should die in the lifetime of the mother, leaving issue at his death, such issue should take *per stirpes* the share of such deceased child. The settlement also contained the usual hotchpot, advancement, maintenance, and accumulation clauses, and a power of appointing new trustees; the power of advancement, during the lifetime of the tenant for life, requiring her consent in writing.

If a settlement is made by the court in pursuance of informal directions on a lady who is at the time of full age, it is probable that a restraint on anticipation, in event of her marriage, will not be inserted, unless it be in accordance with her own wish (b). It is also a doubtful point whether, in construing words directing a settlement on a female and her issue, power should be given to the lady to appoint an interest to any future husband, such a power not being within the wording of the directions, yet being one which may assist the lady to make a beneficial marriage (c).

(z) Small circumstances, however, would lead the court to authorize a more extensive power.

(a) These words were included to avoid the possibility of a perpetuity.

(b) *Symonds v. Wilkes*, 13 W. R. 1026; Dav. Prec. vol. 3, p. 72. And see *supra*, Chap. II.

(c) *Charlton v. Rendall*, 11 Ha. 296; *Stanley v. Jackson*, 23 Beav. 450.

Restraint on anticipation.

Hotchpot.

It was decided, in an Irish case, that a hotchpot clause will not be made in a settlement made in execution of articles not referring to it; but this was so decided chiefly on the ground—the articles being very old—that at the time they were drawn, the hotchpot clause, now almost universal, was not usually inserted (*d*), and it is probable that this case is no longer an authority.

Issue not  
always pro-  
vided for.

Where a testator directed “the girls’ shares to be settled upon themselves strictly,” it was argued, not unnaturally, on the authority of *Young v. Macintosh* (*e*), and other cases, that the settlement should extend to the daughters’ children; but Lord Romilly, M. R., held that the income of the shares of each of the testator’s daughters, directed by the will to be settled on themselves strictly, should, during the joint lives of herself and her husband, be paid to her for life without power of anticipation, and that if she should die in the lifetime of her husband then her share should go as she should by will appoint, and in default of appointment to her next of kin, exclusively of her husband, and that if she should survive her husband then the share should belong to her absolutely (*f*).

(*d*) *Lees v. Lees*, I. R., 5 Eq. 549.

(*e*) 13 Sim. 445.

(*f*) *Loch v. Bagley*, L. R., 4 Eq. 122; 15 W. R. 1103.

## CHAPTER X.

## AVOIDANCE OF SETTLEMENT BY CREDITORS.

MARRIAGE and other settlements otherwise valid are liable to be avoided by creditors under the stat. 13 Eliz. c. 5 (*a*) ; and, in the case of the bankruptcy or insolvency of the settlor, under the more stringent provisions of the recent Bankruptcy Acts (*b*).

Early acts of parliament had been enacted for the same purpose, but they have been for the most part repealed (*c*). Settlements are also liable to be avoided as against purchasers under the stat. 27 Eliz. c. 4.

It may be well first to consider how far marriage settlements may be avoided under the statute of Elizabeth, and not under the Bankruptcy Acts, and we may premise that, speaking generally, the law applicable in the absence of bankruptcy proceedings is applicable also in the event of bankruptcy, but that the acts of the settlor, in event of his bankruptcy or insolvency, are liable to the effect of additional provisions, which have been specially enacted for the purpose of protecting his creditors from having their claims improperly defeated by settlements, or other dispositions of their debtor's property (*d*).

(*a*) It has been said, that the common law was sufficient to attain every end proposed by this statute of Elizabeth ; the statute 13 Eliz. c. 5, must be carefully distinguished from the statute 27 Eliz. c. 4. The former protects creditors, the latter purchasers.

(*b*) 32 & 33 Vict. c. 71, and 46 & 47 Vict. c. 52.

(*c*) Cf. 3 H. 7, c. 4 ; 50 Ed. 3, c. 6 ; 2 R. 2, c. 3. All of these have been repealed, at least so far

as they relate to England, by the 26 & 27 Vict. c. 125 (Statute Law Revision Act, 1863).

(*d*) Under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 91, the creditors' statutory remedy to avoid settlements is restricted to the case of traders, and a list of the various avocations which constitute a person a trader are given in the first schedule to that act. Under the new Act of 1883 the restriction is removed.



A settlement made previously to, and in consideration of, marriage, is, as is well known, made upon the most valuable consideration, and in the absence of actual fraud it is good against all claimants, both under the statute of Elizabeth and the bankruptcy legislation; and this is so, even though the settlor is indebted at the date of the settlement, and the wife knows it (*e*); and this, even though there is inserted, as happened in one case, a false recital that the property settled is the property of the wife (*f*).

If, however, a marriage is only part of a scheme to defraud creditors, the marriage settlement may be set aside. Thus, where a man, in insolvent circumstances, married a woman with whom he had previously cohabited for seven years, and thereupon made a settlement, conveying to trustees the whole of his property, it was held that the settlement was itself an act of bankruptcy, and was void against his assignees (*g*). So, in a more recent case, where a man executed an ante-nuptial settlement, and married a woman with whom he had cohabited, with the intent on his part to defraud his creditors, and the wife was implicated in the transaction, the settlement was held to be void against his creditors (*h*).

13 Eliz. c. 5. The statute, now being considered, is specially framed so as not to defeat a *bonâ fide* purchaser for value (*i*). In *Copis v. Middleton* (*k*), Sir Thomas Plumer, V.-C., speaking of the statute of 13 Eliz., says:—"The preamble of the act is for the avoiding and abolishing of feigned, covinous and fraudulent feoffments, as well of lands and tenements

(*e*) See (*inter alia*) *Bulmer v. Hunter*, L. R., 8 Eq. 46; 38 L. J., Ch. 543; 20 L. T. 942; 17 W. R. (Dig.) 50; *Campion v. Cotton*, 17 Ves. 263; *Fraser v. Thompson*, 1 Giff. 49; *Ex parte MacBurnie's Trustees*, 1 D., M. & G. 441.

(*f*) *Campion v. Cotton*, *ubi sup.*

(*g*) *Columbine v. Penhall*, 1 Sm. & Giff. 228. This case was decided under the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), s. 70.

(*h*) *Bulmer v. Hunter*, L. R., 8 Eq. 46, *et ubi sup.*

(*i*) The term purchaser includes, of course, a person claiming under a *bonâ fide* ante-nuptial settlement.

(*k*) 2 Madd. 410, 427. In this case a nephew had purchased an estate from his uncle, who was in insolvent circumstances. No great undervalue was proved, and it did not appear that the nephew was aware of the state of his uncle's affairs on the purchase.

as of goods and chattels devised and contrived of malice, 13 Eliz. c. 5. fraud, covin, collusion or guile, to the end, purpose and intent to delay, hinder or defraud creditors and others of their just and lawful actions, suits and debts, not only to the let or hindrance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing between man and man, without which no commonwealth or civil society can be maintained or continued. A conveyance, therefore, to be one affected by the act, must be shown to be feigned, covinous, and fraudulent, and made with an intent to delay, hinder or defraud creditors. But if this case were held to be within the statute, it would be the overthrow of all true and plain dealing and bargaining between man and man, for, as the purchaser cannot know the circumstances of the vendor, it would prevent all dealing and bargaining as between man and man, and counteract the object of the statute. The statute, in order to prevent this inconvenience, has by the 6th section provided, that the act shall not extend to any conveyance upon good consideration (*l*), and *bonâ fide* to any person not having at the time of such conveyance any manner of notice or knowledge of such covin, fraud or collusion. A conveyance, therefore, cannot be invalidated by this act if there has been a *bonâ fide* purchaser”(*m*).

In *Thompson v Webster* (*n*), V.-C. Kindersley said, with regard to the general principle of the act:—“The principle now established is this; the language of the act being, that any conveyance of property is void against creditors if it is made with intent to defeat, hinder or delay creditors; the court is to decide in each particular case whether on all the circumstances it can come to the conclusion that the intention of the settlor, in making the settlement, was to defeat, hinder or delay the creditors.”

(*l*) “Good” here means valuable.  
(*m*) *Copis v. Middleton, ubi sup.*  
In this case it appears incidentally that land near Chichester was

worth a rent of as much as 50*s.* to 52*s.* per acre in 1792!  
(*n*) 4 Drew. 628.

In *Golden v. Gillam* (o), Fry, L. J., says of this act, with special reference to the fact of the existence in any case of a good or valuable consideration, as follows:—"It is obvious that the intent of the statute is not to provide equal distribution of the estates of debtors amongst their creditors; there are other statutes which have that object; nor is it the intent of this statute to prevent any honest dealing between one man and another, although the result of such dealing may be to delay creditors, and have been cited accordingly where deeds of this nature have been held good, though the result of such dealing has been that creditors have been not only delayed but excluded. The effect on a deed of this sort, of its being for good consideration, is very great. It does not necessarily show that the deed may not be void under the statute, because in many cases good consideration has been proved, and yet the object of the deed has been to defeat and delay creditors, which has been therefore for an unconscientious purpose, and the fact that there has been good consideration will not uphold the deed. But, nevertheless, it is a material ingredient in considering the case, and for very obvious reasons. The fact that there is valuable consideration, shows at once that there may be purposes in the transaction other than the defeating and delaying of creditors, and renders the case therefore of those who contest the deeds more difficult."

In the case of *Harman v. Richards* (p), Turner, L. J., then V.-C., says, as follows:—"It remains to be considered whether the settlement which was then made for valuable consideration was also made *bonâ fide*, for a deed, though made for valuable consideration, may be affected by *mala fides*. But those who undertake to impeach for *mala fides* a deed which has been executed for valuable consideration, have, I think, a task of great difficulty to discharge."

(o) *In re Johnson, Golden v. Gillam*, L. R., 51 L. J., Ch. 503, affirming 20 C. D. 389, 392; 51

L. J., Ch. 154; 46 L. T. 222.  
(p) 10 Ha. 89.

The question of the fulness of the value given for a purchase will not be very carefully weighed on a *bond fide* sale. The point seems to be this, that an owner as against his creditors may sell but may not give away, and must, in fact, be just before he is generous; and if he sell *bond fide* to a purchaser, the prudence of the sale and exact amount of the purchase-money will not be minutely weighed, especially as a person in embarrassed circumstances making a forced sale may not unnaturally be compelled to sell at some loss (q).

Though the court will not go into the question whether the consideration be adequate or not, yet gross undervalue may be a proof of fraud, as if 200% be given for a property worth 2,000% (r).

Voluntary settlements stand on a very different position from those for which there is a valuable consideration, and if it is the effect of the transaction that the creditors are defrauded, the settlement cannot be sustained as against them (s).

And there is no difference in such cases whether the parting with the property is by voluntary settlement or by gift, whether it is in anticipation of death or of bankruptcy, or whether it is by the free will of the donor, or at the instance of the donee (t).

And it is not necessary to show any personal fraud in these cases if the creditors are, in fact, defeated. The parties must be taken in law to have intended the result which actually happens, and it is not necessary that there

(q) In *Upton v. Bissett* (Cro. Eliz. 444), Owen, J., said, "He was at the making of the statute of Elizabeth, when special care was taken that there should not be any words which should extend to purchasers."

(r) *Doe v. Routledge*, Cowp. 705; *Griffith v. Spratley*, 1 Cox, 383; *Bassett v. Nosworthy*, Finch, 102; *Moore v. Crofton*, 3 J. & L. 438. And as to undervalue, see also *Herne v. Meere*, 1 Vern. 465; *Partidge v. Gopp*, Amb. 596; *Matheu*

*v. Feaver*, 1 Cox, 279. In *Nott v. Hill*, Lord Nottingham regretted that the rule of civil law, that a bargain of double the value was avoidable, was not English law.

(s) *Reese River Mining Company v. Atwell*, L. R., 7 Eq. 347; *Cornish v. Clark*, L. R., 14 Eq. 184; 42 L. J., Ch. 14; 26 L. T. 494; 20 W. R. 897.

(t) Per Lord Romilly in *Cornish v. Clark*, *ubi sup.*

should be proof of an actual and express intent to defeat creditors in order to defeat a voluntary settlement (u).

It follows from what has been said, that to enable a settlement to be held good against the operation of the 13 Eliz. c. 5, the settlement must be one both for value and made *bonâ fide*. A settlement simply *bonâ fide* for a meritorious object will not be effectual, nor will a settlement be held good though it be made for value, if it be made with any fraudulent intention.

Where an insolvent conveyed all his estate to trustees in trust to carry on his business and to pay a dividend on the debts of certain assenting creditors, the latter indemnifying the trustees, with a resulting trust in favour of the debtor of the shares of dividend payable to non-assenting creditors, it was held that the deed was void under the statute as containing a resulting trust in favour of the debtor, and tending at least to delay creditors (x).

(u) Per Fry, L. J., in *Golder v. Gillam*, L. R., 20 C. D. p. 393; and cf. *S. C.*, 51 L. J., Ch. 503; *ibid.* 154; 46 L. T. 222.

(x) *Spencer v. Slater*, L. R., 4 Q. B. D. 13; 48 L. J., Q. B. 204; 39

L. T. 424; 27 W. R. 134. But see *Boldero v. London and Westminster Discount Company*, L. R., 5 Ex. D. 47; 28 W. R. 154; 42 L. T. 57: where *Spencer v. Slater* is distinguished.

## CHAPTER XI.

## AVOIDANCE OF SETTLEMENTS OF REALTY.

EVERY voluntary settlement of realty is void under the 27 Elizabeth, c. 4 (*a*), against a subsequent purchaser of the property comprised in it for value. And such a settlement is void, though free from actual fraud, and though made for a meritorious consideration, and though the purchaser have notice of it (*b*).

Voluntary  
settlement  
void against  
purchaser.

In *Doe v. Manning* (*c*), Lord Ellenborough reviewed the previous cases, and drew from them the deduction that, if a settlement was voluntary, it was therefore *ipso facto* voidable and fraudulent within the meaning of the statute. This decision was given in the year 1807, and has been followed ever since (*d*); and though this was not always considered to be law, yet antiquarian researches into cases of an earlier date containing old *dicta* to the contrary would now be a waste of time (*e*). It must, however, be borne in mind that any ante-nuptial settlement, in the absence of actual fraud, is considered to have been made for valuable consideration (*f*); and it is also to be observed that this statute does not extend to personal chattels (*g*), but extends to realty alone, including, however, copyholds (*h*) and chattels real or leaseholds (*i*).

Statute ex-  
tends to realty  
alone.

(*a*) This statute is given in the Appendix of Statutes, *infra*, p. 255.

(*b*) *Buckle v. Mitchell*, 18 Ves. 100.

(*c*) 9 East, 59.

(*d*) Per Jessel, M. R., in *Trowell v. Shenton*, L. R., 8 C. D. 325.

(*e*) *Ibid.*

(*f*) See last chapter.

(*g*) *Jones v. Croucher*, 1 S. & S. 315.

(*h*) *Doe d. Tremlett v. Bothwick*, 5 B. & A. 131.

(*i*) Cf. *Price v. Jenkins*, L. R., 5 C. D. 619; 46 L. J., Ch. 805; 37 L. T. 51; reversing 4 C. D. 483; 46 L. J., Ch. 214; 36 L. T. 237; 25 W. R. 427.

A mortgagee is a purchaser within the statute, and a voluntary settlement is invalidated to the extent of his interest, leaving, however, all the persons interested under the settlement in the same position in which they were originally placed, except to the extent to which the mortgagee is let in and displaces them (*k*).

Purchaser  
favoured.

A judgment creditor is not, however, within the benefit of the statute, and takes only the judgment debtor's interest in exactly the plight in which he finds it (*l*), though the statute itself gives to a purchaser for valuable consideration from the person who has executed a voluntary settlement a title higher and better than that which the latter himself possessed (*m*).

The doctrine of marshalling does not apply, so as to allow a judgment creditor indirectly to effect what he could not do directly; for instance, where there are other creditors who have different funds to resort to, he cannot prevent them satisfying their claims out of the sole fund, which he can look to as his security (*n*).

Post-nuptial  
settlement  
void.

A post-nuptial settlement, though importing to be made in pursuance of an ante-nuptial bargain, is only voluntary if the ante-nuptial bargain be one which, for any reason, could not have been enforced. It might well seem arguable, as it has been in fact argued, that in a case where an ante-nuptial agreement has failed to satisfy the requirements of the Statute of Frauds or of Lord Tenterden's Act, yet that if a post-nuptial settlement were made satisfying those requirements in conformity to such agreement, such post-nuptial agreement would be one for valuable consideration; and that the statutes only prevented an action for damages or for specific performance being maintained against the person who made the ante-nuptial agreement, but did not prevent the settlement

(*k*) *Dolphin v. Aylward*, L. R., L. T. 640; 27 W. R. 851.  
4 H. L. 486, 500; 23 L. T. 636.

(*m*) *Ibid.*

(*l*) *Cracknall v. Janson*, L. R., 11  
C. D. 1; 48 L. J., Ch. 168; 40

(*n*) *Dolphin v. Aylward*, L. R., 4  
H. L. 486, 500; 28 L. T. 636.

relating back to the ante-nuptial agreement so as to be one for valuable consideration. This, however, is not the case, and the contrary has been recently authoritatively held (*o*).

It is not necessary, of course, for money to pass to create a valuable consideration. Such a consideration equally arises where a person gives up a certain pecuniary advantage at the time of the grant, as where a sum of money is paid down at the time. So, in *Townend v. Toker* (*p*), where a person claiming under a settlement had agreed to remove his residence, and had incurred considerable costs by such removal, and had subjected himself to increased expense in living upon the faith of the settlement, the court held that these circumstances in themselves were sufficient to take the case out of the statute of Elizabeth (*q*); and this, notwithstanding that there is no mention of this consideration in the deed, a consideration not being excluded, because it does not so appear on the face of the document (*r*).

In *Townend v. Toker* (*s*), there was also a covenant to indemnify the settlor against certain mortgages to an extent greater than the law compelled by implication, and this was also held to be a valuable consideration. Had the covenant been less large, it would probably have been thought otherwise, as an express covenant to do what the law would bind the grantor to do without it could not create a consideration, for otherwise it would be impossible to make a voluntary settlement of an equity of redemption.

In cases of this class the *quantum* of the consideration is

(*o*) Per Jessel, M. R., and Cotton, L. J., on appeal, in *Trowell v. Shenton* (reversing *Hall v. C.*), L. R., 8 C. D. 324, 326; 47 L. J., Ch. 738; 38 L. T. 369; 26 W. R. 837; following *Warden v. Jones*, 2 De G. & J. 76; and not following *Barkworth v. Young*, 4 Drew, 1; and *Dundas v. Dutens*, 2 Cox, 235; and *Lavender v. Blackstone*, 2 Lev. 146.

(*p*) L. R., 1 Ch. 446, 460; 14

L. T. 531; 12 Jur. 477; 35 L. J., Ch. 608; 14 W. R. 806.

(*q*) Per Turner, L. J., in *Townend v. Toker*, *ubi sup.* And see *Stiles v. Attorney-General*, 2 Atk. 152; *Does v. James*, 16 East, 212; *Bullock v. Sadlier*, Amb. 764.

(*r*) *Townend v. Toker*, *ubi sup.*; *Bayspoole v. Collins*, L. R., 6 Ch. 228; 40 L. J., Ch. 289; 25 L. T. 282; 19 W. R. 313.

(*s*) *Ubi sup.*

Money need  
not pass.

*Townend v.*  
*Toker.*

Quantum of



consideration not very closely weighed. Where a relative had promised the settlor a sum of 150*l.*, on the execution by him of a post-nuptial settlement in favour of his wife and children of a property to the value of 1,300*l.*, the settlement was held to be for value (*t*).

not weighed. A bargain between husband and wife, altering their relative positions and their relative rights and interests, may be sufficient to give a valuable consideration for a settlement, as, for instance, where the husband gives up his estate by curtesy, and the wife's estate in fee is reduced to a life estate in favour of the issue of the marriage (*u*).

On the contrary, a simple covenant to do an act of no benefit to the grantor was not held to raise any consideration (*x*).

Secret mortgage void.

A mortgage executed in 1871 contained a recital that the mortgagor was indebted to the mortgagee in the sum of 1,500*l.* for moneys advanced by his step-daughter to him. The money had, in fact, been advanced in 1864, but there had been then no agreement for a mortgage, and there had been no pressure for payment, and the mortgage deed had remained in the possession of the mortgagor; and the fact of the execution of such a deed had not been made known to the mortgagee. It was held that the mortgage was void under 27 Eliz. c. 4, as against a subsequent mortgagee for value, the Court of Appeal being of opinion that the mortgagor had made the mortgage, to be used only if he thought it convenient, in favour of his step-daughter (*y*).

(*t*) *Bayspoole v. Collins*, L. R., 6 Ch. 228, by Hatherley, L. C., affirming *James, V.-C.*

(*u*) *In re Foster and Lister*, L. R., 6 C. D. 87; 46 L. J., Ch. 480; 36 L. T. 582; 25 W. R. 553. In this case, *Goodright d. Humphreys v. Moses*, 2 W. Bl. 1019; *Currie v. Nind*, 1 My. & Cr. 17, and *Butterfield v. Heath*, 15 Beav. 400, were

disapproved, and *Hewison v. Negus*, 16 Beav. 594; 22 L. J., Ch. 635, and *Teasdale v. Braithwaite*, L. R., 5 C. D. 630; 46 L. J., Ch. 725; 36 L. T. 601; 25 W. R. 546, were followed by Jessel, M. R.

(*x*) *Rosher v. Williams*, L. R., 40 Eq. 210; 44 L. J., Ch. 419; 32 L. T. 387; 23 W. R. 561.

(*y*) *Cracknell v. Jenson*, L. R.,

It has been argued that if a voluntary settlement be set aside as against a purchaser under the statute of Elizabeth, yet the purchase-money ought to be held upon the trusts of such settlement, and it was in fact so decided in an old case (z); but the contrary is now the correct opinion, and it may be considered settled that the purchase-money belongs to the settlor freed from trust (a).

No trust attaches to purchase-money.

The effect of the statute of 27 Elizabeth is, therefore, unreasonable though it may appear, to enable a voluntary settlor, to get rid of a settlement of realty by simply selling it to a purchaser (b). He cannot enforce specific performance of a contract to sell, but the contract being entered into, the purchaser can against him enforce specific performance, and the voluntary settlement becomes nothing more than a piece of waste parchment (c). And on such a sale the trusts of the voluntary settlement do not attach to the purchase-money which belongs to the settlor absolutely, and it makes no difference that the purchaser has notice of the trust (d).

However, it seems, that neither an heir, nor devisee of a voluntary settlor, can by conveyance for valuable consideration get rid of a settlement made by his ancestor or testator, however voluntary, such heir or devisee not having in fact any estate or interest to convey (e). An assignment of leaseholds, by way of settlement to trustees, may be held to be for valuable consideration, by reason of the liabilities in respect of the rents and covenants incurred by the trustees, and in this way be not void under the statute

Secus as to heir of settlor.

Assignment of leaseholds creates valuable consideration.

11 C. D. 1, 22. In this case, *Exton v. Scott* (6 Sim. 31) was distinguished.

(z) *Leach v. Dene*, Reg. Lib. B. (1640), cited in *Townend v. Toker*, L. R., 1 Ch. 461.

(a) *Townend v. Toker*, *ubi sup.*; *Daking v. Whimper*, 26 Beav. 568; *Pulvertoft v. Pulvertoft*, 18 Ves. 84, 91; *Evelyn v. Templer*, 2 Bro. C. C. 147.

(b) *Buckle v. Mitchell*, 18 Ves. 100.

(c) *Rosher v. Williams*, L. R., 20 Eq. p. 218; *et ubi sup.*

(d) *Pulvertoft v. Pulvertoft*, 18 Ves. 84, 93.

(e) *Lewis v. Rees*, 3 K. & J. 132; *Doe d. Newman v. Rusham*, 17 Q. B. 133; but cf. *Burrell's case*, 6 Rep. 72, and *Jones v. Whittaker*, 1 Long. & Town., Ir. Ex. 141.

of Elizabeth (*f*). Thus, where a widower on his second marriage made a settlement in which he assigned certain leasehold property to trustees, one of whom was a son by his former marriage, upon trust for the settlor for life, and after his death for his said son, and the settlor afterwards contracted to sell the premises, it was held, in an action by the purchasers, that the settlement was not a voluntary conveyance under the 27 Eliz. c. 4, on the ground that the assignment of leasehold property, to which liabilities is attached, is in itself a conveyance for a valuable consideration (*g*). In this case the court thought that it was impossible to hold that the settlement was voluntary, as regarded the son, who was himself one of the assignees of the leaseholds. The trustees came under a responsibility for payment of rent, and performance of the covenants of the lease. It might be such a responsibility that a lessee might be actually willing to pay money to get rid of it. If there were any valuable consideration for a settlement, the *quantum* of such a consideration was of no consequence under the statute of Elizabeth. There was, therefore, a valuable consideration sufficient to support the settlement against a subsequent purchaser, and the purchaser's title could not, therefore, prevail against that of the trustees of the settlement (*h*).

*Price v.  
Jenkins.*

(*f*) 27 Eliz. c. 4.

(*g*) *Price v. Jenkins*, L. R., 5 C. D. 619; 4 C. D. 483.

(*h*) Per James, L. J., *ibid.*, on appeal from Hall, V.-C., and see *Ex parte Dobell*, 26 W. R. 407. But cf. per Jessel, M. R., in *In re*

*Ridler*, L. R., 22 C. D. 74; 31 W. R. 93. Cf. *Ex parte Hillman*, L. R., 10 C. D. 622; 48 L. J., Bk. 77; 40 L. T. 177; 27 W. R. 517. And from the latter case it seems that the doctrine of *Price v. Jenkins* is not likely to be extended.

## CHAPTER XII.

## AVOIDANCE OF SETTLEMENTS IN BANKRUPTCY.

It has been seen that voluntary settlements are avoidable in many ways. They are with regard to realty liable to be set aside as against purchasers under one statute of Elizabeth (*a*), and as against creditors as to both realty and personalty by another statute of the same reign (*b*).

Further, they are liable to be avoided under the bankruptcy law. Thus, under the Bankruptcy Act, 1869 (*c*), settlements by traders were made avoidable in event of bankruptcy or liquidation. The statute embraced property of every description, and while it was stricter in regard to the nature of the "valuable" consideration required to support a settlement than the previous acts referred to, it was less strict in the sense that it applied to traders only, and also that it allowed a certain efflux of time to make valid a settlement otherwise voidable. It is to be borne in mind, also, in the consideration of this act, and of the Bankruptcy Act, 1883, which has now superseded it, that the statutes of Elizabeth are not in any way repealed, and that a settlement valid under the bankruptcy law as having been two or ten years, as the case

Settlements  
avoidable  
under bank-  
ruptcy law.

Statutes of  
Elizabeth  
still opera-  
tive.

(*a*) 27 Eliz. c. 4.

(*b*) 13 Eliz. c. 5. In both these statutes there are provisions still unrepealed for the forfeiture of the value of a certain proportion of the property—half to the Crown, and half to the person aggrieved, together with half a year's imprisonment to the person guilty of setting up such a settlement; but it is

believed that these penalties are practically obsolete. A defendant, however, may refuse to answer interrogatories which might criminate him in respect thereof. *Week v. Parker*, 22 Beav. 59.

(*c*) 32 & 33 Vict. c. 71, s. 91 (since repealed, and superseded by the Bankruptcy Act, 1883).

may be, before insolvency, or otherwise, as the case may be, may yet be fraudulent and void under one of the earlier statutes; and it cannot be too carefully borne in mind that the legislative penalties are, as it were, cumulative, and that it is in addition to the liability to which a settlement is exposed of being set aside under the statutes of Elizabeth, that it is liable to be avoided if it offend against the provisions of the bankruptcy law.

By the Bankruptcy Act, 1883 (*d*), it is enacted as follows:—

Settlements  
voidable  
under Bank-  
ruptcy Act,  
1883, s. 47.

(1.) “Any settlement of property not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was, at the time of making the settlement, able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof.

(2.) “Any covenant or contract made in consideration of marriage for the future settlement on or for the settlor’s wife or children of any money or property, wherein he had not at the date of his marriage any estate or interest, whether vested or contingent, in possession or remainder, and not being money or property of or in right of his wife, shall, on his becoming bankrupt before the property or money has been actually transferred or paid pursuant

to the contract or covenant, be void against the trustee in the bankruptcy.

(3.) "Settlement" shall for the purposes of this section include any conveyance or transfer of property (e).

Not only may a settlement not supported by a sufficient consideration be avoided in certain events under the Bankruptcy Act, 1883, but the settlor may himself be punished, by having an order of discharge refused for attempting to make such a settlement. By the act it is enacted as follows: "In either of the following cases, that is to say, (1) In the case of a settlement made before and in consideration of marriage, when the settlor is not at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement; or (2) if in the case of any covenant or contract made in consideration of marriage for the future settlement on or for the settlor's wife or children, of any money or property, whereas he had not at the date of his marriage any estate or interest (not being money or property of or in right of his wife); if the settlor be adjudged bankrupt, or compounds or arranges with his creditors, and it appears to the court that such settlement, covenant or contract was made in order to defeat or delay creditors, or was unjustifiable, having regard to the state of the settlor's affairs at the time when it was made, the court may refuse or suspend an order of discharge, or grant an order subject to conditions, or refuse to approve an arrangement, as the case may be, in like manner as in cases where the debtor has been guilty of fraud" (f).

Penalty for attempting to make settlement.

And a settlement fraudulent within the meaning of the statute may itself amount to an act of bankruptcy (g).

Fraudulent settlement.

Sect. 91 of the Bankruptcy Act, 1869, had previously to the Bankruptcy Act, 1883, made absolutely void against

Comparison of Acts of 1869 and 1883.

(e) The above is, to a great extent, a re-enactment of sect. 91 of the 32 & 33 Vict. c. 71; see *infra*, p. 78, note; but the last lines of sub-sect. 1 and the whole of sub-sect. 2 are new.

(f) 46 & 47 Vict. c. 52, s. 29.

(g) *Ibid.* s. 4.

the trustee in bankruptcy of a settlor (being a trader) any settlement by the debtor (not being an ante-nuptial settlement, or one made *bonâ fide* for valuable consideration) which was made within two years previously to the bankruptcy, and also any such settlement made within ten years previously, unless the settlor could prove that he was solvent at the time he made the settlement. The same section also made void any covenant by a trader in consideration of marriage to make a future settlement of any property which he did not then possess. For convenience of comparison the section is given below (*h*).

It will be observed that sect. 47 of the Bankruptcy Act, 1883, is in terms very similar to sect. 91 of the Bankruptcy Act, 1869. There is, however, a very important distinction, namely, that the section of the present act applies to all persons, while the section in the Act of 1869 is applicable to traders alone.

The words also at the close of sub-sect. (1) of sect. 47 in the last act, and which provide that the interest of the settlor must pass to the trustees of the settlement on the execution thereof, are novel (*h*). So, also, in some respects,

(*h*) 32 & 33 Vict. c. 71, s. 91.  
 "Any settlement of property made by a trader not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor, of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of such settlement, be void as against the trustee of the bankrupt appointed under this act, and shall, if the settlor becomes bankrupt at any subsequent time within two years after the date of such settlement, unless the parties claiming under such settlement can prove that the settlor was at the time of making

the settlement able to pay all his debts without the aid of the property comprised in such settlement, be void against such trustee. Any covenant or contract made by a trader in consideration of marriage for the future settlement upon or for his wife or children of any money or property wherein he had not at the date of his marriage any estate or interest, whether vested or contingent, or in possession or remainder, and not being money or property of or in right of his wife, shall, upon his becoming bankrupt before such property or money has been actually transferred or paid pursuant to such contract or covenant, be void against his trustee appointed under this act. 'Settlement' shall, for the purposes of this section, include any conveyance or transfer of property."

is the wording of sub-sect. 2 in the last act, avoiding in certain cases covenants or contracts in favour of the wife or children of the settlor of property, wherein the settlor is not interested at the date of the settlement (*i*). Subject, however, and having regard to the effect of these differences of language, the decisions as to the avoidance of settlements under sect. 91 of the Bankruptcy Act, 1869, will be applicable to the interpretation of sect. 47 of the Bankruptcy Act, 1883, and some of the more important of these decisions will accordingly be here given.

Doubts have been frequently entertained as to what is a future interest for the purposes of these sections, especially where the settlor has an interest in funds, but subject to a power of appointment, and the appointment is exercised.

What is a future interest.

A trader, who was entitled under his father's will to a share in his father's property, subject to power for the father's widow to appoint among himself and his brothers and sisters, covenanted on his marriage to settle her share whether appointed or unappointed. The widow appointed one-third to him, and the remainder to the other children, two in number. The covenantor became bankrupt, and it was held that the covenant was not void under sect. 91 of the Bankruptcy Act, 1869, the court holding, that at the time of the covenant the covenantor had at least a vested interest in the equal one-third share of the property subsequently appointed to him, though it was liable to be divested by an appointment (*k*).

Where a trader, by his marriage settlement, covenanted that he would pay 6,000*l.* to the trustees thereof on or before a given day, to be held by them upon the trusts of the settlement, and before the money was payable filed a petition for liquidation by arrangement, it was held (affirming the decision of Bacon, C. J.) that a covenant for

Covenant to pay sum of money.

(*i*) *Ibid.*

(*k*) *In re Andrews' Trusts*, L. R., 7 C. D. 635; 26 W. R. 572; 38 L. T., N. S. 137. But see *In re Vizard's Trusts*, L. R., 1 Ch. 588;

*S. C.*, L. R., 1 Eq. 667; 14 L. T. 182; 35 L. J., Ch. 460. And cf. *Sweetapple v. Harlock*, L. R., 11 C. D. 745; 48 L. J., Ch. 660; 41 L. T. 272; 27 W. R. 865.



payment of a sum of money, not specifically earmarked, was not within the 91st section of the Bankruptcy Act, 1869, as a covenant for the future settlement of money or property in which the trader had no interest at the date of his marriage, and that the trustees were entitled to prove against his estate for the 6,000*l.* less the value of the settlor's life interest which they were entitled to retain (*m*), and the court expressed an opinion that the intention of the legislature was to prevent settlements of property expected to accrue at a future time in which the settlor had no present interest (*n*).

A person made a voluntary settlement of an estate which was subject to a mortgage, and covenanted with the trustees of the settlement that he would pay the interest on the mortgage, and, when required, pay off the principal, and his assets, exclusive of the mortgaged estate, were sufficient to pay his debts other than the mortgage debt, but not sufficient to pay both, and he afterwards became bankrupt. It was held on appeal (reversing the decision of the court below), that the settlement was void as against the trustee in bankruptcy under the Bankruptcy Act, 1869, s. 91 (*o*).

Covenant to settle after-acquired property.

In *Ex parte Bolland* (*p*) a settlement contained a covenant by the settlor with the trustees that all future real or personal property which the settlor should at any time during the coverture be possessed of or entitled to, or should otherwise acquire by devolution, gift, devise, bequest, purchase, accumulation, or otherwise, howsoever should be

(*m*) *Ex parte Bishop, In re Tinnies*, L. R., 8 Ch. 718; 42 L. J., Bky. 107; 28 L. T. 862; 21 W. R. 716.

(*n*) Per James, L. J., *ib.* It is to be noted that the wording of the Act of 1883 is different in this respect. See *supra*.

(*o*) *Ex parte Hixtable, In re Combeer*, L. R., 2 C. D. 54; 34 L. T., N. S. 605; 45 L. J., Bky. 59; 24 W. R. 685.

(*p*) *Ex parte Bolland, In re Clint*,

L. R., 17 Eq. 115; 43 L. J., Bky. 16; 29 L. T., N. S. 543; 22 W. R. 152; but cf. *Galavan v. Dunne*, 7 L. R., Ir. 144. And see *Hordey v. Green*, 12 Beav. 132; *Lewis v. Madocks*, 8 Ves. 150; 17 Ves. 48; since recent legislation it may not be asked how far the usual covenant to settle all after-acquired property by a married woman may not be open to objection should she be made bankrupt.

conveyed and assigned to the trustees upon the trusts thereby declared. In 1870, the settlor bought more shares in a joint stock company. In February, 1873, he was adjudicated bankrupt. At this time the shares were still standing in his name, but the certificates were in the possession of his wife's father, and they were afterwards delivered to the trustees of the settlement. It was shown that the settlor was solvent at the date of the settlement. The court held, that the covenant was void as against the creditors, and that the trustee under the bankruptcy was entitled to the shares, being of the opinion, that nothing could be more opposed to the plain reason and justice and policy of the law than that a man, whether in fraud or not, should on his marriage undertake that whatever fragment of property he might acquire during the coverture, down to the smallest particular, should be subject to the trusts of his settlement.

It was held, that sect. 91 of the Bankruptcy Act, 1869 (*q*), applied to settlements made before, as well as after, the date when the act came into operation. That the corresponding section of the Bankrupt Law Consolidation Act, 1849, was entirely repealed by the repealing sections of the later act, and had no operation upon a settlement executed by a person who was adjudged bankrupt at the time of the Bankruptcy Act, 1869, even though the settlement was executed before that act came into operation (*r*).

How far acts retrospective.

Though a settlement made before and in consideration of marriage is *prima facie* valid, yet it will not be so held in case of actual fraud. In deciding *Bulmer v. Hunter* (*s*), the law applicable to cases of this kind was stated as follows:—

Ante-nuptial settlement void if actual fraud.

“The principles are plain. No doubt a man indebted to any extent may, on his marriage, make a settlement of

(*q*) 32 & 33 Vict. c. 71.  
(*r*) *Ex parte Dawson, In re Dawson*, L. R., 19 Eq. 433; 44 L. J., Bkcy. 49; 23 W. R. 354; 32 L. T.,

N. S. 101.  
(*s*) L. R., 8 Eq. 46, 49; 38 L. J., Ch. 543; 20 L. T. 942; 17 W. R. (Dig.) 50.

his property, provided the settlement is made honestly and in good faith. But it is clearly established now that marriage cannot be made the means of committing fraud, though it is necessary to show that it was connected with fraud to make a settlement invalid against the wife. Of course, if it be shown that there was an act of bankruptcy before the marriage, that would prove that the property did not belong to the husband at all;” and after stating, that in the case before him there had been no such act of bankruptcy, the Vice-Chancellor continued as follows:—“The rule I intend to adhere to is that which is laid down in *Columbine v. Penhall* (t), where it is said by Vice-Chancellor Stuart, ‘Where there is evidence of an intent to defeat and delay creditors, and to make the celebration of marriage part of a scheme to protect property against the rights of creditors, the consideration of marriage cannot support such a settlement.’”

Where marriage part of scheme to protect property.

“Purchaser” means “buyer.”

It was decided that “a purchaser,” within sect. 91 of the Bankruptcy Act, 1869, must be an actual buyer. In the case of *Ex parte Hillman, re Pumfrey* (u), the late Master of the Rolls, confirming on appeal the decision of the chief judge on the construction of this word, said as follows:—“In the first place, the Bankruptcy Act is a special code of law relating to bankruptcy, as a general rule for commercial men, and we must therefore expect to find words used in it in the sense in which commercial men use them. In the next place, that the words of sect. 91 are used in that sense, is, I think, clear from the words themselves, independently of any other consideration. It is said, that the settlement made for the benefit of the bankrupt’s wife and children comes within the exception from the section. It is argued that, because the leasehold houses are subject to the payment of the rent and the performance of the covenants of the lease, therefore the trustees of the settlement are purchasers of the houses in

(t) 1 Sm. & Giff. 228, 256.

J., Bkcy. 77; 27 W. R. 567; 40

(u) L. R., 10 C. D. 622; 48 L. L. T. 177.

good faith and for valuable consideration. It appears to me that this argument is not well-founded. I think that in this section the word 'purchaser' means a 'buyer' in the ordinary commercial sense, not a purchaser in the legal sense, of the word. That this is so is made obvious by the use of the other word 'incumbrancer,' for every incumbrancer is a purchaser in the legal sense. The two words, purchaser and incumbrancer, are contrasted with each other. It is impossible to say that, in any sense of the word, a trustee for the settlor's wife and children is a 'buyer' of the settled property." In this decision James and Bramwell, L.JJ., concurred, and it was consequently held, that a trustee of a post-nuptial settlement of leaseholds was not a purchaser for valuable consideration within the meaning of the Bankruptcy Act, though he might have been so under the statute of Elizabeth (x).

*Ex parte Hillman.*

Questions often arise, on the bankruptcy or insolvency of persons holding property under settlements, whether simply as trustees, or as tenants for life thereof, or the like, as to the rights (if any) of the insolvent creditors over such property. As a rule, a person with a partial interest in property gives to his creditors only what he has got himself, unless the "order and disposition" clause, as it is termed, of the Bankruptcy Act applies, which it rarely does where the person insolvent is *bond fide* in possession under a settlement (y).

Bankruptcy of persons with limited interests.

By the Bankruptcy Act, 1883 (z), s. 44, sub-s. 3, it is enacted, that the property of the bankrupt divisible amongst his creditors shall comprise (among other things), "All goods being at the commencement of the bankruptcy in the possession, order or disposition of the bankrupt in his

(x) *Price v. Jenkins*, L. R., 5 C. D. 619; 46 L. J., Ch. 805; 37 L. T. 51; reversing 4 C. D. 483; 46 L. J., Ch. 214; 36 L. T. 237; 25 W. R. 427; *Ex parte Doble*, 26 W. R. 407; 38 L. T., N. S. 183.

(y) Per Bacon, C. J., in *Re Anslow*, *Ex parte Barber*, 28 W. R. 522; 42 L. T. 411; but see *Kitchen v. Ibbetson*, L. R., 17 Eq. 46; 43 L. J., Ch. 52.

(z) 46 & 47 Vict. c. 52.

Reputed  
ownership.

trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof; provided that things in action, other than debts due or growing due to the bankrupt, in the course of his trade or business, shall not be deemed goods within the meaning of this section."

There is a considerable variation between this clause and the section dealing with the same subject in the Bankruptcy Act, 1869. To a very great extent, however, the decisions on the one will probably be held applicable to the other. The clause in the Bankruptcy Act, 1869, is subjoined (a).

The order and disposition clauses of the Act of 1869, and of the earlier Bankruptcy Acts, were held not to apply, so as to vest the property in the trustees' assignees for the benefit of the insolvent creditors, in cases where the possession of the property was consistent with the title. Thus, it was not considered to be applicable where the insolvent was tenant for life (b).

Nor does it apply where the insolvent is in possession as administrator (c).

"True  
owner."

Moreover, the "true owner," mentioned in these clauses, must be quite a distinct person from the reputed and insolvent owner; it is not sufficient to bring a case within the spirit of the provision that the reputed owner, being a partial owner, is in possession, with the consent of the true owner, of the remaining interest in the property (d).

(a) 32 & 33 Vict. c. 71, s. 15, sub-s. 5, where the property divisible is made to include the following particulars:—"All goods and chattels being at the commencement of the bankruptcy in the possession, order or disposition of the bankrupt, being a trader, by the consent and permission of the true owner, of which goods and chattels the bankrupt is reputed owner, or of which he has taken upon himself the sale or disposition

as owner; provided that things in action, other than debts due to him in the course of his trade or business, shall not be deemed goods and chattels within the meaning of this clause."

(b) *Ex parte Martin*, 19 Ves. 491.

(c) *Ex parte Marsh*, 1 Atk. 159; *Yate Lee*, Bkcy. p. 166; *Lewin on Trusts*, 7th ed. pp. 222, 584.

(d) *Yate Lee*, p. 168; *Reynolds v. Bowley*, L. R., 2 Q. B. 475; 15 W. R. 813; 16 L. T. 532; 36 L. J., Q. B. 81.

And it seems, that the infancy of the true owner may be an element in the consideration in favour of the exclusion of the doctrine of reputed ownership (e).

The creditors of a *cestui que trust*, tenant for life of **Heirlooms**. chattels, cannot seize them where the legal estate therein is in trustees (f). But there is considerable difficulty as to the title of creditors of a tenant for life in the case of heirlooms, or like chattels, when the legal estate therein is in the tenant for life, as the creditors would appear probably to have the legal title to possession thereof, and such possession would probably defeat the intention of the settlor (g).

It is to be observed, that the assets of a trust estate in the hands of a trustee may be followed, so far as they can be ear-marked, and may be recovered for the benefit of the trust estate (h).

Moreover, if a trustee who is insolvent has a beneficial interest in the funds, the *cestuis que trustent* may have a lien on such beneficial interest for any breach of trust (i).

It may be added, that in valuing such beneficial interest—should it be, for instance, for life—special circumstances, such as the ill-health of the life tenant, may not improperly be taken into consideration so as to reduce the value of the interest (k).

(e) *Viner v. Cadell*, 3 Esp. 88.

(f) *Earl of Shaftesbury v. Russell*, 1 B. & Cr. 666; Lewin, p. 684; Jarman, vol. 1, p. 835.

(g) *Foley v. Burnell*, 1 B. C. C. 274.

(h) Lewin, pp. 762, 764.

(i) *Jacobs v. Rylands*, L. R., 17 Eq. 341; 43 L. J., Ch. 280.

(k) *Rowley v. London and North-Western Rail. Co.*, L. R., 8 Ex. 221; 29 L. T. 180; 21 W. R. 869.

## CHAPTER XIII.

### PERPETUITIES AND ACCUMULATIONS.

**Perpetuities to be avoided.** MUCH care should properly be taken in making settlements to avoid offending against the law against perpetuities. And it is necessary to do this, even in the creation of the powers ordinarily inserted in marriage and other settlements, for the purpose of enabling the trustees to enter upon and manage the estate during minorities, accumulate rents, and the like. Such powers are (if pains be not taken) liable to be wholly or partially defeated by falling within the general rule against perpetuities on the one hand, and (so far as they apply to accumulations) to the provisions of the Thellusson Act on the other.

**Perpetuity is against public policy.** The rule against perpetuities is one of public policy, and it is not founded on any statute. It has been stated that, like the fetter on anticipation in the case of married women, the rule is an invention of the Chancellors (*a*). Historically, however, it seems that a harder rule was adopted by the courts of common law than in Chancery. In *Scattergood v. Edge* (*b*), Treby, C. J., after giving as the limit of executory devises the period of lives in being, said that further they should never go by his consent, let Chancery do as it pleased. With a natural affection for their offspring the courts have agreed to extend the doctrine; thus, Lord Eldon, in *Ware v. Polhill* (*c*), was inclined to extend it to make void a general power of sale,

(*a*) Marsden on Perpetuities, p. 9. This statement is supported by the eminent authority of the late Master of the Rolls in *In re Ridley*,

L. R., 11 C. D. 645; 48 L. J., Ch. 563; 27 W. R. 527.

(*b*) 12 Mod. 282.

(*c*) 11 Ves. 257.

a course which would have seemed *prima facie* almost a *reductio ad absurdum* of the principle. Further, in dealing with cases of this class, the courts have overlooked the salutary doctrine of endeavouring to effectuate as much as possible the intention *ut res magis valeat quam pereat*, and they hold, without regard to the actual facts of the case, that if a limitation could under any circumstances become void it is so at once and *in toto*. In the case of the law against accumulation, on the contrary, which is a creation of statute, they hold a direction for accumulation, though exceeding the legal limit, to be good, so far as it does not trespass against the rule, and bad only as to the excess.

The consideration is applicable to the law of perpetuities, and that of accumulations are somewhat similar, and they will be dealt with in the same chapter and to a certain extent together, it being premised that the law on both subjects is in an uncertain and unsatisfactory state, and that the reader must be referred to works more directly dealing with the subject for anything like a detailed consideration of the questions (*d*).

Difference between perpetuities and accumulations.

One of the earliest cases in which a power to trustees to manage estates and receive the rents was held void for perpetuity was that of *Lake v. Halford* (*e*). In this case there was a devise to J. J. for life, with remainders to his first and other sons in tail male, with a proviso, that if the devisees entitled to the possession of the estate should be severally under the age of twenty-six years the trustees should receive the rents and apply them as directed. J. J. died leaving a son under the age of twenty-six years, and it was held that the proviso was void as against him (*f*).

Power of management too remote.

(*d*) See Lewis on Perpetuities, Suppl., p. 176 *et seq.*; Marsden on Perpetuities; Davidson's Precedents, vol. 3, part 1, 465, n. (*o*).

(*e*) Ambl. 479.

(*f*) This case is generally cited as an authority on this subject: but the reasons for the decision of the Court of King's Bench are not

given; and it might seem from the form of the question put for decision that the judgment proceeded on the ground that the power failed on the son attaining the age of twenty-one years, as being repugnant to the larger estate previously given to him.



In *Floyer v. Bankes* (g), by a settlement real estate was assured to the use of trustees for a term of 500 years, and subject thereto to the use of A. for life, with remainder to his first and other sons in tail, with remainder to B. for life, with remainder to his first and other sons in tail, with divers remainders over, and a power was given to the trustees, during the minority of any person who should from time to time be entitled under the limitation of the settlement to the immediate freehold as a tenant for life or in tail, to enter into possession of and manage the estates; and it was in this case that the power was void for remoteness.

Term for  
portions too  
remote.

In *Sykes v. Sykes* (h), a testator in 1803 devised estates to his eldest son R. for life, with remainder to his grandson R. for life, with remainder to trustees to preserve contingent remainders, with remainder to other trustees for 500 years, with remainders over to the second and other sons of R. in tail, and in default of issue to his (the testator's) younger son N. for life, with remainder to the sons of N. in tail. The limitation of the term was for the purpose of enabling the trustees by mortgage or otherwise, in case any one or more of the testator's younger sons, or their issue, should be seised in possession by virtue of the limitations of the estates devised to his son R. for life, with remainders over, to raise a sum of 5,000*l.* for the benefit of such of the testator's sons (except the son in possession of the estates) as should be then living or their issue.

*Sykes v.*  
*Sykes.*

The testator's eldest son had no son other than R., and he died in 1870 without issue, and the estates devolved upon the infant defendant, a grandson of the testator's son N. On a bill filed by a younger son of N. with others

(g) L. R., 8 Eq. 115; 17 W. R. (Dig.) 53, 156. See also *Browne v. Stoughton*, 14 Sim. 369; *Marshall v. Holloway*, 2 Sw. 432; *Lord Southampton v. M. of Hertford*, 2 V. & B. 54; *Ferrard v. Wilson*, 4

Ha. 376; *Bacon v. Proctor*, Turn. & Russ. 31; and *Bateman v. Hotchkin*, 10 Beav. 426.

(h) L. R., 13 Eq. 56; 41 L. J., Ch. 25; 25 L. T. 560; 20 W. R. 90.

to have the sum of 5,000*l.* raised, it was held, on demurrer to the bill, that the charge failed for remoteness.

It should be noticed, that in this case (*i*) the term of 500 years was paramount to the estate tail, and therefore not liable to be destroyed by barring that estate, and though it was contended unsuccessfully that if the estate tail were barred, the contingency on which the 5,000*l.* was raiseable could not occur, yet, in reliance on *Case v. Drosier* (*k*) and *Baker v. Tucker* (*l*), it was held that the limitation of the term was too remote.

It may be observed by reference thereto, that in many of the cases previously cited, it was argued that the powers were not too remote by reason that either the term of years upon which they depended or the contingencies on which they were to arise, or both, were subsequent to an estate tail, and were consequently liable to be destroyed if that estate were barred. Many cases and the decisions of many judges have seemed to establish that this principle, that is to say, that the destructibility or indestructibility of the powers is the true test whether they do not or do offend against the law of perpetuities (*m*).

Effect of  
destructibility  
of powers.

Thus, in *Briggs v. Earl of Oxford* (*n*), Lord Cranworth says:—"If the law be not that a power is always good so far as perpetuity is concerned, if it is capable of being barred by a common recovery, or by that which is now equivalent to a common recovery, perhaps it is a matter of regret that such is not the state of the law. If there are any exceptions to that rule, I think they have created more embarrassment than is compensated for by any benefit which they have purchased."

Probably, now, there would be reluctance to encourage exceptions to the rule, referred to by Lord Cranworth. It cannot, however, yet be said that there is a clear exception

Doubt as to  
the question.

(*i*) *Sykes v. Sykes*, *ubi sup.*

(*k*) 2 Keen, 764; 5 My. & Cr.

246.

(*l*) 5 H. L. C. 106.

(*m*) Cf. *Bateman v. Hotchkin*, 10 Beav. 426.

(*n*) 1 De G., M. & G. 363.

to the law of perpetuities, in favour of cases where the executory limitation comes after an estate tail: there are cases not overruled, in which it has been held that the destructibility of a limitation is not always a test whether it is or is not void for remoteness (*o*).

*Lantsbery v. Collier.*

It remains to be observed that powers of sale, leasing, exchange, management, and the like, are capable of being supported, although their exercise is not in terms restrained within the limit of perpetuity (*p*); from the consideration that such powers are exerciseable so long only as any of the purposes of the settlement exist, and that therefore the powers (assuming the limitation of the settlement to be proper) cannot be too remote (*q*). This salutary and convenient doctrine will probably be extended rather than restricted in the consideration of future cases. At the same time, having regard to existing decisions, it would not be well to rely too strongly upon the application of the doctrine, especially in cases where powers are given during the minorities of tenants in tail and the like.

In order to avoid the difficulty as to perpetuities in the powers given to trustees during minorities of tenants in tail, it is usual and proper to confine their existence to the case of minorities of tenants in tail *by purchase*. The insertion of this restriction, which is sometimes thought to be put in rather *ex abundanti cautela* than of necessity, prevents all question as to perpetuity in these cases, except, perhaps, as to directions for accumulation.

Effect of the property being "at home."

It is to be observed, that even a power of sale may be not free from objection if it be so limited that it may travel

(*o*) See *Sykes v. Sykes*, L. R., 13 Eq. 62; 41 L. J., Ch. 23; 25 L. T. 560; 20 W. R. 90; *Seaward v. Willock*, 5 East, 98; *Marshall v. Holloway*, 2 Sw. 422; *Brown v. Stoughton*, 14 Sim. 369; *Scarisbrook v. Skelmersdale*, 17 Sim. 369; *Turvin v. Newcomb*, 3 K. & J. 16.

(*p*) Marsden on Perpetuities, p. 241.

(*q*) *Lantsbery v. Collier*, 2 K. & J. 709; 25 L. J., Ch. 672; *Doncaster v. Doncaster*, 2 Jur., N. S. 1066; 3 K. & J. 26; *Peters v. East Grinstead Rail. Co.*, L. R., 18 C. D. 429; 45 L. T. 234; 29 W. R. 875; affirming L. R., 16 C. D. 703; 18 C. D. 429; 44 L. T., N. S. 372; *In re Cotton's Trustees*, L. R., 19 C. D. 624; 51 L. J., Ch. 514; 46 L. T. 813; 30 W. R. 610.

through minorities for an indefinite time (*r*). As to this, however, it is to be borne in mind, as has been already previously noticed, that when once the fee simple becomes vested absolutely in possession, by whatever means, whether the expiration or sooner determination of the preceding estates, and whether such estates are for life or in tail, then the power of sale becomes void, as there are persons in existence who, if the legal estate is in the trustees, are in a position to call for a conveyance to them of the legal estate, the end and object of the settlement being attained (*s*). In this way no power of sale can, it may be argued, be of longer continuance than are the trusts of the settlement, and, if they are not open to objections in regard to the doctrine of perpetuities, it would seem that the power of sale would be likewise free from objection (*t*).

Thus, a power of sale, given to trustees by a will, may determine upon the beneficiaries becoming absolutely entitled through the death of the tenant for life, the property then being, as it is styled, "at home" (*u*).

*Peters v. Lewes, &c. Rail. Co.*

The limit as to accumulations differing in that respect from the tenant as to perpetuities is statutory, and founded on the well-known Thellusson Act (*x*).

(*r*) Per Lord Eldon in *Ware v. Polhill*, 11 Ves. 257.

(*s*) Preston on Abstracts, vol. 2, p. 158; *Lantsbery v. Collier*, 2 K. & J. 709; 25 L. J., Ch. 672.

(*t*) As to the cessation of a power of sale or exchange on the union of the particular estate with the reversion in fee see *Wolley v. Jenkins*, 23 Beav. 53; 3 Jur., N. S. 321. And cf. the recent case of *Peters v. Lewes and East Grinstead Rail Co.*, *ubi sup*.

(*u*) Per Hall, V.-C., in *Peters v. Lewes and East Grinstead Rail. Co.*, L. R., 16 C. D. 703; *et ubi sup*. But *semble*, notwithstanding the death of the tenant for life, the power might have been exercised within a reasonable time afterwards for the purpose of dividing the property. Per Jessel, M. R., *S. C.*,

on appeal, L. R., 18 C. D. 430; 45 L. T. 234; 29 W. R. 875.

(*x*) 39 & 40 Geo. 3, c. 18. By this act, sects. 1 and 2, it is provided that "no person shall after the passing of this act by any deed or deeds, surrender or surrenders, will, codicil, or otherwise, howsoever, settle or dispose of any real or personal property, so and in such manner that the rents, issues, profits, or produce thereof shall be wholly or partially accumulated for any longer term than the life or lives of any such grantor or grantors, settlor or settlors, or the term of twenty-one years from the death of any such grantor, settlor, deviser or testator, or during the minority or respective minorities of any person or persons who shall be living, or in *ventre sa*

Law against accumulations.

Before the passing of the Thellusson Act, accumulations might have been co-extensive with, but could not exceed, the limits of an executory devise—that is to say, they might be valid until an unborn child of a person having attained twenty-one years of age; but a limitation to vest only in the first descendant of a person who might attain twenty-one was too remote (*y*).

Accumulations during minorities.

So, where there was a trust for a term during the respective minorities of the respective tenants for life, or in tail in possession, to receive and lay out the rents and produce in stock, to accumulate for such persons as should upon the expiration of such minorities, or death of the minors, be tenants in possession, or entitled to the rents, and of the age of twenty-one years, it was held that the trust was, independently of the Thellusson Act, too remote, and, being void in its creation, was incapable of modification, so as to establish it in the extent to which it might have been originally carried (*z*).

Excess only of accumulations void.

There is a very important distinction, which has already been adverted to, between cases where a limitation offends against the provisions of the Thellusson Act against accumulations, and where it offends against the general law of

*mère*, at the time of the death of such grantor, deviser, or testator, or during the minority or respective minorities only of any person or persons who under the uses or trusts of the deed, surrender, will, or other assurance directing such accumulations, could for the time being, if of full age, be entitled unto the rents, issues, and profits, or the interest, dividends, or annual produce so directed to be accumulated, and in every case where any accumulation shall be directed, otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits, and produce of such property so directed to be accumulated contrary to the provisions of this act, go to and be received by such person or persons as would have been entitled thereto

if such accumulations had not been directed. Provided always, and be it enacted, that nothing in this act contained shall extend to any provision for payment of debts of any grantor, settlor, or deviser, or other person or persons, or to any provision for raising portions for any child or children of any grantor, settlor, or deviser, or any person taking any interest under any such conveyance, settlement, or devise, or to any direction touching the produce of timber or wood upon any lands; but that all such provisions and directions shall and may be made and given as if this act had not passed."

(*y*) *Lord Southampton v. Marquis of Hertford*, 2 V. & B. 61.

(*z*) *Ibid.*

perpetuities. In the former case, the accumulation exceeding the limit allowed by the State is void only as regards the excess, and the direction to accumulate is good so far as it does not transgress (a). In the latter case (as is well known), the limitation which offends by exceeding the allowed limit is void *in toto*, and from the commencement.

As regards the powers of accumulation during minorities, there is some doubt whether, even if they are confined to the minorities of tenant in tail by purchase (b), they may not yet be exposed to partial failure under the Thellusson Act. These powers are generally supposed to derive their validity from the clause in that act authorizing accumulations during the minority of any person who would, if of full age, be entitled for the time being under the trusts to the income (c).

Some decisions have, however, appeared to narrow the effect of these words materially. In *Haley v. Bannister* (d), Sir J. Leach, V.-C., considered that the statute prevented an accumulation during the minority of a child unborn at the death of the testator. But it seems that in this and other similar cases (e) an accumulation was involved, in addition to the accumulation during the minority, also from the death of the testator till the birth of the unborn child, and the commencement of the minority, so that, in fact, a double accumulation was directed, which (as the modes of accumulation allowed by the act are alternative only) was clearly invalid; and it may be that this was the real *ratio* of the decisions in those cases, and that the *dicta* of the judges, confining accumulation during minorities to the case of minors existing at the death of the testator, were not strictly necessary for the purposes of decision. It remains to add, that it is probable that the courts would

Accumulations during minorities.

(a) *Ibid.*

(b) See *ante*, p. 90.

(c) 39 & 40 Geo. 3, c. 18, s. 1. See *supra*, p. 91, note.

(d) 4 Mad. 275.

(e) *Longdon v. Simson*, 12 Ves.

295; *Ellis v. Maxwell*, 3 Beav. 596.

struggle against being compelled to hold invalid the usual power of accumulation during minorities, even though the minors were after-born (*f*).

Provisions of  
Thellusson  
Act not  
cumulative.

It is also to be observed, that the powers in the Thellusson Act are not cumulative, but alternative. Thus, a direction cannot be validly given to accumulate during twenty-one years, and also during minorities, though either period would separately be within the limit allowed by the statute (*g*).

(*f*) Jarman on Wills, vol. 1, N. S. 288; *Jagger v. Jagger*, 49 p. 286. L. T. 667; 32 W. R. 284; L. R.  
(*g*) *Wilson v. Wilson*, 1 Sim., 25 C. D. 729.

## CHAPTER XIV.

## SEPARATE USE.

It is well known that originally at common law the husband and wife were considered as one person, represented as to all legal acts by the husband, with the effect, for the most part, that the right to all the property of the wife was vested in the husband (*a*).

The principle, so far as it affects the right to property, has been so materially altered in operation by recent legislation, that it can hardly be said longer to exist. Independently of acts of parliament, courts of equity had modified the harshness of the old rule by the well-known doctrine which allowed a married woman to possess "separate estate," free from the control, liabilities, and debts of her husband. As it has been, and probably will remain (*b*), very usual in marriage settlements to give a part or the whole of the wife's property to her for her separate use, it is desirable to notice shortly the nature and incidents of property so given.

"Separate estate" in equity.

The doctrine is one which has gradually grown up till it has made, in effect, the position of a married woman in equity as to her separate property, both in regard to rights and liabilities almost identical with that of a *feme sole*.

(*a*) The husband's interest was of course always a limited one in the real estate of the wife.

(*b*) Under recent legislation and particularly the 45 & 46 Vict. c. 75, Married Women's Property Act, 1882, a woman marrying will, for the most part, retain her own property for her separate use, without the intervention of any express settlement: yet the execution of proper marriage settlement will still be desirable, at all events, where, as is generally the case, it is desired to give to the wife an inalienable provision by restraining her from anticipation of her property. The act, the most important provisions of which are given in the Appendix, *infra*, does not affect past or future marriage settlements.



A married woman can dispose of separate property,

It has gradually become settled that a married woman has a very complete power of disposal over property settled to her separate use. In *Fettiplace v. Gorges* (c), Lord Thurlow said, that the first case upon the subject was a very old one in *Tothill*; where it was decided that if a married woman, from her separate stock, had saved a sum of money she might dispose of it; what the word "stock" meant, however, did not appear, but he had always thought it settled that from the moment in which a woman took personal property to her sole and separate use, from that moment she had the sole and separate right to dispose of it. And the personal property, the moment it could be enjoyed, must be enjoyed with all its incidents.

either by will or deed.

The decision in this case was followed in a case shortly afterwards (d), in which it was held that, where the instrument only expressed a trust for the separate use of the married woman, without giving to her express power of disposal, the nature of the interest was ascertained, and that she was able to dispose of the property by will, as such a power was incident to her absolute interest (e).

How far express charge necessary.

Great doubt has, however, from time to time been felt, and, indeed, to some extent remains, as to how far a married woman is able or liable to charge her separate estate by her general engagements. At first the power of a married woman over such property was thought to be less extensive than it is now held to be, and, in particular, it was doubted if she would be liable, unless she expressly charged her separate estate. Indeed it was at first considered, that an express charge of the particular property was necessary in order to make it liable, but later on a wider view prevailed (f).

(c) 1 Ves. 46, 48; 3 Bro. C. C. 7; see also *Grigsby v. Cox*, 1 Ves. 517; and *Peacock v. Moule*, 2 Ves. 190.

(d) *Rich v. Cockell*, 9 Ves. 369, 375.

(e) And cf. *Pride v. Bubb*, L. R.,

7 Ch. 64; 41 L. J., Ch. 105; 25 L. T. 890; 20 W. R. 220; *Taylor v. Meads*, 34 L. J., Ch. 203; 4 De G., J. & S. 597.

(f) And now see 45 & 46 Vict. c. 76, s. 1, sub-s. 3.

In *Murray v. Barlee* (g) Lord Brougham, treating of the doctrine of the liability of a married woman's separate property to her engagements, but in terms applicable to her general position in regard to the subject, reviews the law as follows:—

Decision of  
Lord  
Brougham in  
*Murray v.  
Barlee*.

“I take the foundation of the doctrine to be this: the wife has a separate estate, subject to her own control, and exempt from all other interference or authority. If she cannot affect it, no one can; and the very object of the settlement which vests it in her exclusively, is to enable her to deal with it as if she were discovert. The power to affect it being unquestionable, the only doubt that can arise is, whether or not she has validly encumbered it. At first, the court seems to have supposed that nothing can touch it but some real charge, as a mortgage, or an instrument amounting to an execution of a power, where that view was supported by the nature of the settlement. But afterwards her intention was more regarded, and the court only required to be satisfied that she intended to deal with her separate property. When she appeared to have done so, the court held her to have charged it, and made the trustees answer the demand thus created against it. A great deal of the nicety that attends the doctrine of powers thus came to be imported into this consideration of the subject. If the wife did any act directly charging the separate estate, no doubt could exist; just as an instrument expressing to be in execution of a power was always, of course, considered as made in execution of it. But, also, if by any reference to the estate, it could be gathered that such was her intent, the same conclusion followed. Thus, if she only executed a bond, or made a note, or accepted a bill, because those acts would have been nugatory if done by a *feme covert*, without any reference to her separate estate, it was held, that she must be intended to have designed a charge on that estate, since in no other

By old law  
express  
charge re-  
quired.

Then inten-  
tion to charge  
presumed  
from bond,  
&c.

(g) 3 M. & K. 220.

Then intention presumed without writing.

way could the instrument thus made by her have any validity or operation; in the same manner as an instrument, which can mean nothing if it means not to execute a power, has been held to be made in execution of that power, though no direct reference is made to that power. Such is the principle. But doubts have been, in one or two instances, expressed as to the effect of any dealing, whereby a general engagement only is raised; that is, where she becomes indebted without executing any written instrument at all. This point was discussed in *Greatley v. Noble* (*h*), and the Master of the Rolls (Sir John Leach) appears in the subsequent case of *Stuart v. Kirkwall* (*i*) to have been of opinion that the wife's separate estate was not liable without a charge, and to have supposed that he had before stated that opinion in *Greatley v. Noble*, though he by no means expressed himself so strongly in disposing of that case, and distinctly abstained from deciding that point. I own I can perceive no reason for drawing any such distinction. If, in respect of her separate estate, the wife is in equity taken as a *feme sole*, and can charge it by instruments absolutely void at law, can there be any reason for holding that her liability, or, more properly, her power of affecting the separate estate, shall only be exercised by a written instrument? Are we entitled to invent a rule, to add a new chapter to the Statute of Frauds, and to require writing where that act requires none? Is there any equity, reaching written dealings with the property, which extends not also to dealings in other ways, as by sale and delivery of goods? Shall necessary supplies for her maintenance not touch the estate, and yet money furnished to squander away at play be a charge on it, if fortified by a scrap of writing? No such distinction can be taken upon any conceivable principle. But one of the earlier cases, *Kenge v. Delavall* (*k*), makes no mention of such a distinction, for

(*h*) 3 Mad. 79.

(*i*) 3 Mad. 387.

(*k*) 1 Vern. 326.

there, being indebted generally is all that is stated as grounding the claim; and in *Lillia v. Airey* (l), the party who had furnished supplies to the wife, was held entitled to recover to the extent of her separate maintenance. She had, it is true, given a bond, but only for 60*l.*; the court, however, held the creditor entitled to a larger sum, the separate maintenance exceeding the amount of the bond."

In *Johnson v. Gallagher* (m) the Lord Justice Turner *Johnson v. Gallagher.* states the law on the subject, as regards a married woman's general engagements, as follows:—

"Since the case of *Jones v. Harris* (n) there is not, so far as I am aware, any case opposed in any degree to the doctrine of the separate estate being liable for general engagements, except the case of *Aguilar v. Aguilar* (o), which followed *Jones v. Harris*, and the dicta of Sir John Leach in *Greatley v. Noble* (p), and *Stuart v. Lord Kirkwall* (q); and, on the contrary, the cases of *Murray v. Barlee* (r), *Owens v. Dickenson* (s), *Burke v. Tuite* (t), *Vaughan v. Vanderstegen* (u), and *Wright v. Chard* (x), contain very decisive dicta in favour of such liability. The weight of authority, therefore, seems to me to be in favour of the liability. I think, too, that the principle on which all the cases proceed, that a married woman in respect of her separate estate is to be considered as a *feme sole*, is also in favour of it; and, upon the whole, therefore, I have come to the conclusion that not only the bonds, bills and promissory notes of married women, but also their general engagements, may affect their separate estates, except as the Statute of Frauds may interfere where the separate property is real estate. I am not prepared, however, to go the length of saying that the separate estate will, in all cases, be affected by a mere general engagement. The

(l) 1 Ves. jun. 277.  
(m) 3 D., F. & J. 513.  
(n) 9 Ves. 493.  
(o) 5 Mad. 214.  
(p) 3 Mad. 387.  
(q) 3 Mad. 387.

(r) 3 M. & K. 209.  
(s) 1 Cr. & P. 48.  
(t) 19 Ir. L. Rep. (Eq.) 467.  
(u) 2 Drew. 165.  
(x) 4 Drew. 673.

cases of *Jones v. Harris* and *Aguilar v. Aguilar* show that the engagement which, if the married woman was a *feme sole*, the law would create for repayment of the consideration of a void annuity, would not affect it. It seems to follow, that to affect the separate estate there must be something more than the mere obligation which the law would create in the case of a single woman. What that something more may be must, I think, depend in each case on the circumstances. What might affect the separate estate in the case of a married woman living separate from her husband, might not, as I apprehend, affect it in the case of a married woman living with her husband. What might bind the separate estate if the credit be given to the married woman, would not, as I conceive, bind it if the credit be not so given. The very term 'general engagement,' when applied to a married woman, seems to import something more than mere contract, for neither in law nor in equity can a married woman be bound by contract merely: *Aylett v. Ashton* (y). According to the best opinion which I can form of a question of so much difficulty, I think that, in order to bind the separate estate by a general engagement, it should appear that the engagement was made with reference to and upon the faith or credit of that estate; and that, whether it was so or not, is a question to be judged by this court upon all the circumstances of the case."

General engagement must be made with reference to separate property.

He then goes on to treat of the important and difficult class of cases where a married woman has an interest more or less limited in her separate property, as follows:—

"The separate estate of married women being thus far bound by their debts, obligations and engagements, it has next become a question how far those debts, obligations and engagements affect the *corpus* of the property where the married woman has a limited interest only—as, for instance, a life estate with a power of appointment. The

Limited interest in separate property.

cases on this subject may, as it seems to me, well be classed under three heads—first, where the power of appointment has been general, by deed, or writing, or by will; secondly, where it has been by will only, and the power has been exercised; and, thirdly, where there has been a limitation in default of appointment, and the power has not been exercised. In cases falling under the third class there cannot, as it seems to me, be any reasonable doubt that the debts and engagements of the married woman cannot prevail against the parties entitled in default of appointment, and the case of *Nail v. Punter* (z) impliedly decides that point. The cases falling under the second class, where the power of appointment is by will only, and has been exercised but not for the creditors, the authorities do not appear to me to be consistent. In *Norton v. Turrill* (a), as explained in *Socket v. Wray* (b), the exercise of the power by the will of the married woman seems to have been held to let in a bond-creditor against the appointees under the will; and in *Hughes v. Wells* (c), I seem to have intimated that this might be the effect of the exercise of the power, as in other cases of the exercise of the general power of appointment by will, and certainly not upon the ground that power is property. But Vice-Chancellor Kindersley, in whose judgment I have quite as much confidence as in my own, seems to have dissented from *Hughes v. Wells* in the case of *Vaughan v. Vanderstegen* (d), and I observe that Sir William Grant has treated the point as doubtful in *Heatley v. Thomas* (e). I say no more, therefore, upon this point than that it may be considered as open. But in cases falling under the first class, where the power of appointment has been by deed, or writing, or will, the courts have certainly held the *corpus* of the property to be subject to the debts and engagements of the married woman.”

Life interest  
coupled with  
power.

(z) 5 Sim. 555.

(a) 2 P. W. 144.

(b) 4 Bro. C. C. 483..

(c) 9 Ha. 749.

(d) *Ubi sup.*

(e) 15 Ves. 596.

Engagements  
do not extend  
to future  
property.

The general engagements, however, of a married woman, it has now been decided authoritatively, can be enforced only against so much of her separate estate as she was entitled to at the time such engagements were entered into, and which remains at the time when judgment is given, and not against separate estate acquired by her subsequently to the date of the engagements, nor to any estate which she is restrained from anticipating. In fact, a married woman, having separate estate, does not thereby acquire any general *status* to contract as regards other separate estate she may afterwards acquire (*f*).

Life estate  
with power  
of appoint-  
ment.

Where a woman has power to dispose of her separate estate by deed as well as by will, she is capable of charging it, or making it liable for her debts, in the same way as if she were a *feme sole* (*g*). But doubt has been felt as to her capability and liability where she has a power of appointment by will only (*h*). It seems, however, now settled that where property is given to a married woman for life, with remainder as she shall by will only appoint, with remainder to her next of kin, then, in case she exercises the testamentary power of appointment, the property will be liable to pay her debts, the law holding that, as in the case of a person not under disability, she must have been taken to have made the appointment subject to her debts, and to have been just before she was generous (*i*).

(*f*) *Pike v. Fitzgibbon*, L. R., 17 C. D. 454; 50 L. J., Ch. 394; 44 L. T. 562; 29 W. R. 551; on appeal, varying decision of Malins, V.-C. And see *Picard v. Hine*, L. R., 5 Ch. 274; 18 W. R. 75, 178; *Johnson v. Gallagher*, 3 D., F. & J. 494; *Roberts v. Watkins*, 46 L. J., Q. B. 552; *Re Sykes' Trusts*, 2 J. & H. 415; *In re Harvey's Estate*, *Godfrey v. Harben*, L. R., 13 C. D. 216; 49 L. J., Ch. 3; 28 W. R. 73. But see 45 & 46 Vict. c. 76, s. 1, sub-s. 4, which seems to alter this.

(*g*) *Hughes v. Wells*, 9 Ha. 749.

(*h*) *Johnson v. Gallagher*, 3 D., F. & J. 494; *Norton v. Turvill*, 2 P. W. 144; *Soekett v. Wray*, 4 Bro. C. C. 483; *Vaughan v. Vanderstegen*, 2 Drew. 165; *Hulme v. Tenant*, 4 Bro. C. C. 483.

(*i*) *In re Harvey's Estate*, L. R., 13 C. D. 216; *et ubi sup.*; *London Chartered Bank of Australia v. Lem-priere*, L. R., 4 P. C. 570; 42 L. J., P. C. 49; 29 L. T. 186; 21 W. R. 513; 9 Moore, P. C. C., N. S. 402; *Heatley v. Thomas*, 15 Ves. 526. But see *Vaughan v. Vanderstegen*, *ubi sup.*; and *Hobday v. Peters*, 28 Beav. 354.

It is to be observed, that the effect of this decision appears limited to cases where the power has actually been exercised.

In *In re Harvey's Estate* (k), the remainder was, as has been stated, in default of appointment to the married woman's next of kin. It would seem that the doctrine of that case will be *a fortiori* applicable where the remainder is to the personal representatives of the married woman.

The power of a married woman to dispose of her separate property is not confined to property in possession, but extends to her property in reversion (l). Reversionary property.

The intervention of trustees is not absolutely necessary in order to constitute property the separate property, and if none are appointed the husband, previously to the recent Married Women's Property Act, became himself the trustee thereof on behalf of his wife (m). And a beneficial gift to the husband by a *feme covert* of her separate property will not be inferred without clear evidence (n).

Notwithstanding the fact that in very many respects a married woman is treated, in reference to her separate estate, as if a *feme sole*, yet in numerous details her property still remains in an exceptional position. Thus, debts incurred by a married woman for necessaries, and chargeable on money in the hands of trustees for her separate use, are not, it seems, liable to become barred by the Statutes of Limitation (o). Married woman's still exceptional.

Also, it appears that the separate estate of a married woman is not, in general, liable for breaches of trust or torts committed by her; and it seems that such torts are the torts of the husband, and he appears to be liable (p).

(k) *Ubi sup.*

(l) *Sturgis v. Corp.*, 13 Ves. 190.

(m) *Rich v. Cockell*, 9 Ves. 389; *Parker v. Brooke*, *ib.* 583.

(n) *Ibid.*

(o) *Hodgson v. Williamson*, *In re*

*Barber*, L. R., 15 C. D. 87; 42 L. T. 676; 28 W. R. 944.

(p) *Wainford v. Heyl*, L. R., 20 Eq. 321; 44 L. J., Ch. 567; 33 L. T. 155; 23 W. R. 848. And see *Clive v. Carew*, 1 J. & H. 199; but



It was originally thought that, as to the *corpus* of real estate, a deed-acknowledged under the Fines and Recoveries Act is necessary to perfect an alienation by a married woman entitled for her separate use (*q*), but it is probable that the contrary would now be held (*r*); and it seems that acknowledgment is not required, at all events in the case of a life interest (*s*).

What words  
create separate  
estate.

The regular method of settling property on a married woman for her separate enjoyment is by means of a trust for her "sole and separate use" (*t*). The word "separate," it is to be observed in this context, is the necessary and governing word. It has acquired a technical and inflexible meaning, and is the right term of art; and the word "sole," though often added, is not itself essential (*u*).

It is not, however, necessary, in order to create an independent interest, to use any particular word, but any words showing that the intention of the settlor is that the married woman should enjoy the property independently of her husband will give her a separate interest.

Effect of  
word "sole."

Thus, a bequest to a woman for her own use and benefit has been held sufficient to confer upon her a separate interest (*x*). And a direction in a will that the property shall be for the wife's sole use has been held sufficient to vest the property in her, exclusively of the marital right (*y*). But it seems, however, now settled that the word "sole" is not a technical word, and that the use of it *per se* would not be sufficient to exclude the marital right, at all events in a deed not being a marriage settlement (*z*). In marriage settlements, however, such words as "sole," and the like,

see 45 & 46 Vict. c. 76, s. 1, sub-s. 2.

(*q*) White & Tudor, L. C., p. 402. And see *Cahill v. Cahill*, L. R., 8 App. Ca. 420.

(*r*) *Price v. Bubbs*, L. R., 7 Ch. 641.

(*s*) White & Tudor, L. C., *ib.*; and cf. *Price v. Bubbs*, *ib.*

(*t*) Dav. Prec. vol. 3, part 1, p. 87.

(*u*) *Massy v. Rowen*, L. R., 4 H.

L. 288, 289; 23 L. T. 141; 18 W. R. (Dig.) 20.

(*x*) *Jones v. —*, cited at 5 Ves. 520.

(*y*) *Adamson v. Armstrong*, 19 Ves. 419; *Ex parte Ray*, 1 Madd. 199.

(*z*) *Massy v. Rowen*, *ubi sup.*; *Gilbert v. Lewis*, 1 De G., J. & S. 38; *Lewis v. Matthews*, L. R., 2 Eq. 177; 12 Jur. 542.

may be held to confer a separate interest, owing to the presumed intention of the parties as to the object of the interest. And it was said that the word "sole," as applied to the case of a marriage settlement—to a case of contemplated devolution of property upon a married lady—finds its ready and appropriate meaning in its being a provision to secure the property against the control of the husband, and to give to her the sole and absolute disposition of it (*a*).

The fact that a married woman has so ample a power over her separate property renders her liable, on the one hand, to the risk of yielding to the importunity of her husband and parting with the property to him, and, on the other hand, to the consequences of her own extravagance or imprudence in contracting debts and liabilities.

Restraint on anticipation.

It was early endeavoured to prevent this by directions that the income of the fund given to the separate use of a married woman should be paid into her proper hands, or as she might from time to time direct, and the like. But it was considered that these words simply amounted to an unfolding of the nature of a separate estate, and they were all held to be insufficient to restrain her power of alienation (*b*). Effectual words, however, were eventually discovered by, it is stated, Lord Thurlow, who inserted in the settlement of a Miss Watson, whereof he was a trustee, in addition to the usual and ineffectual directions, the words "and not by way of anticipation" (*c*).

It is remarkable that there has not apparently been any actual decision as to the effect of these words, but their efficacy to prevent a married woman from dealing prospectively with her income and property has always been taken for granted, and has been continually acted upon by the courts (*d*).

(*a*) Per Hatherley, L. C., in *Massy v. Rowen*, L. R., 4 H. L. 288, 297, *et ubi sup.*

(*b*) *Pybus v. Smith*, 3 Bro. C. C. 340; *Parkes v. White*, 11 Ves. 209.

(*c*) Per Lord Eldon in *Parkes v. White*, *ubi sup.*, p. 221.

(*d*) See, amongst other cases, *Acton v. White*, 1 Sim. & St. 429; *Barrymore v. Ellis*, 8 Sim. 1; *Medley v. Horton*, 14 Sim. 222; *Field v. Evans*, 15 Sim. 375; *Baker v. Bradley*, 4 De G., M. & G. 597; *Scott v. Davies*, 4 My. & Cr. 89.

Notwithstanding observations of a somewhat contrary bearing by Lord Cottenham (*e*), it is not necessary to adopt the exact formula of words "and not by anticipation," in order to fetter the interest, and any words sufficiently indicating that intention will suffice (*f*).

Usually re-  
vives on  
second  
coverture.

Where there is a gift to the separate use of a woman with an accompanying restraint on anticipation, unless it be directly or by implication confined to an existing or contemplated coverture, both the separate character of the estate and the restraint will revive on the occasion of a second coverture. It is not desirable that these cases should turn upon refined distinctions, and, as a rule, in instruments worded in ordinary form, the restraint on anticipation will be considered not to be restricted to a single specific coverture (*g*).

*Secus*, if  
contrary  
intention  
appear.

However, the *jus mariti* of a second husband is not to be excluded if the separate estate of the lady is made independent only of a specifically named prior husband. Thus, where (*h*) property was in terms given to Jane Davidson, the wife of Henry Davidson, independently of Henry Davidson, her husband, Kindersley, V.-C., thought that the separate use did not extend beyond the husband specifically named. He, indeed, said that he hardly knew what language could be found to express more distinctly that it was intended that what was given was to be independent of the particular husband, and that if he were to decide that it was meant that if ever Mrs. Davidson should marry again, the gift should be for her separate use, independently of any subsequent husband, he should be overthrowing the whole principle on which the doctrine of separate use stood, and that the *jus mariti* was not to be curtailed by ambiguous terms, but by clear and unanswerable expressions of intention.

(*e*) See *Scott v. Davies*, *ubi sup.*

(*f*) Per Turner, L. J., in *Baker v. Bradley*, 4 De G., M. & G. 597.

(*g*) Per Lord Romilly, M. R., in

*Hauckes v. Hubback*, L. R., 11 Eq. 37; 40 L. J., Ch. 49; 23 L. T. 642; 19 W. R. 117.

(*h*) *Moore v. Morris*, 4 Drew. 33.

Where, however, there is no such specific limitation to a single coverture, it may now be considered to be settled that the separate character of the estate and the restraint on anticipation will extend to any subsequent coverture. The law on the subject is summarised by Lord Cottenham in *In re Gaffee* (*i*), when, in overruling some previous cases (*k*), he said that those cases proceeded upon a supposed rule of equity which did no longer exist, and, it being settled that a gift to the separate use, without power of anticipation, would operate upon all the covertures of a woman, unless the provisions are destroyed whilst she is discovert, those cases could not be considered as authorities any longer.

Restraint usually operates on all covertures.

And this view was in a subsequent case expressly adopted by Lord Romilly (*l*).

Although, as has been seen, both the separate character of the wife's property and the restraint on the anticipation thereof will, under the usual wording of clauses creating such trusts, revive upon the arising of a second coverture; yet on the expiration of a coverture, and while continuing a widow, she may deal with any property so settled as she may think fit, and the fact that it is possible that she may re-marry will not affect such power of alienation (*m*).

And she is at liberty while discovert to assure the property to herself, free from the trust for her separate use and from the restraint on anticipation, so as to destroy such trust and restraint in the event of her future marriage (*n*).

Woman can deal with property; intervals of coverture.

The restraint on anticipation may, under certain circumstances, be got rid of in cases of fraud by the married woman. It is a rule of court that a married woman will not be allowed to commit a fraud, and if she does so, the

(i) 1 Mac. & G. 547.

(k) *Knight v. Knight*, 6 Sim. 121; *Benson v. Benson*, *id.* 126.

(l) *Hawkes v. Hubback*, L. R., 11 Eq. 7; 40 L. J., Ch. 49; 23 L. T. 642; 19 W. R. 117. See also *Scarborough v. Borman*, 4 My. & Cr.

377.

(m) *Hawkes v. Hubback*, L. R., 11 Eq. 7, *et ubi sup.*; *Jones v. Salter*, 2 Russ. & My. 208; *Woodmeston v. Walker*, *id.* 297.

(n) *Wright v. Wright*, 2 J. & H. 647.

court will lay hold of any property she may have to perform a contract she may have entered into by means of any fraudulent misrepresentation, notwithstanding a restraint upon anticipation (*o*).

It is to be observed, that the restraint on anticipation does not properly attach, except to an income-producing fund: and on a gift of a fund which is not producing income, notwithstanding a restraint on anticipation, such fund may be paid out to a married woman on her separate receipt, notwithstanding that there is expressed to be a restraint on anticipation (*p*); though the restraint would of course attach to funds in the condition of consols or other income-bearing stocks (*q*).

Conveyancing  
Act, 1881.

Under the Conveyancing and Law of Property Act, 1881, the court has power to remove the restraint on anticipation in fit cases (*r*). But this power is very sparingly used, and where it is the wish of, and clearly for the benefit of, the married woman; for instance, where she is harassed by past creditors, or the like (*s*).

A married woman is, of course, entitled herself to receive the income of her separate property, but she often allows it to be received by her husband. If she do so, she will be considered to acquiesce in such receipt, and will not be able to have an account in respect thereof, except possibly for one year's arrears (*t*).

(*o*) *Stanley v. Stanley*, L. R., 7 C. D. 589; *Vaughan v. Vanderstegen*, 2 Drew. 263; *Sharpe v. Foy*, L. R., 4 Ch. 35; 19 L. T. 541; 17 W. R. 65; *Jackson v. Hobhouse*, 2 Mer. 483. See also *Clive v. Carew*, 1 J. & H. 199; *Arnold v. Woodhams*, L. R., 16 Eq. 29; 42 L. J., Ch. 578; 28 L. T. 351; 21 W. R. 694; *In re Lush's Trusts*, L. R., 4 Ch. 591; 17 W. R. 974; *London and Provincial Bank v. Bogle*, L. R., 7 C. D. 773; 7 L. J., Ch. 301; 7 L. T. 478; 21 W. R. 573.

(*p*) *In re Clarke's Trusts*, L. R., 21 C. D. 748; *In re Croughton's Trusts*, L. R., 8 C. D. 460; 47 L. J., Ch. 795; 38 L. T. 447; 26 W. R. 574; *In re Benton*, L. R., 19

C. D. 277.

(*q*) *In re Ellis's Trusts*, L. R., 17 Eq. 409; 43 L. J., Ch. 444; 22 W. R. 448.

(*r*) 44 & 45 Vict. c. 41, s. 39. The section provides, that "notwithstanding that a married woman is restrained from anticipation, the court may, if it think fit, when it appears to the court to be for her benefit, with her consent, bind her interest in any property."

(*s*) *Hodges v. Hodges*, L. R., 20 C. D. 749; 51 L. J., Ch. 549; 46 L. T. 366; 30 W. R. 483.

(*t*) Lewin, pp. 659, 670, and cases there cited. And see as to arrears of pin-money, *infra*, p. 110.

## CHAPTER XIV.—(continued.)

## PIN MONEY.

AKIN to the subject of money settled to the separate use of a married woman is the consideration of what is known as “pin money.” On the marriage of a man entitled to considerable property, it is usual that he should make provisions for payment by him to his wife of an annual allowance for her personal expenditure. The object of this is, to enable a woman of position not to be harassed by applying to her husband on the occasion of every purchase of clothing or the like, and this allowance is generally termed the wife’s “pin money” (*u*).

It has been said, that there is annexed to the wife’s pin money an implied duty on her part of applying it in or towards her personal wants, in the matters of her personal dress, ornaments and decorations (*x*); but it is doubtful if any such obligation really exist in law, or, at all events, whether such a duty could in any way be enforced (*y*).

There is some conflict of opinion whether any, and (if any), what amount of arrears of pin money can be recovered on behalf of the wife. It has, indeed, been laid down, that the wife can go back for one year (*z*), or even for a fraction of a year (*a*); but it seems, that after the

Arrears of  
pin money.

(*u*) For an amusing account of the nature and incidents of pin money, see per Lord Brougham in *Howard v. Digby*, 2 Cl. & Fin. 654, 657.

(*x*) Per Lord Langdale in *Jodrell v. Jodrell*, 9 Beav. 45.

(*y*) The duty seems one of imperfect obligation, and it rather

appears that payment of pin money cannot be withheld by the husband, though the wife should be a miser and a slattern; see Lord St. Leonards’ Handy Book, p. 141.

(*z*) *Howard v. Digby*, 2 Cl. & F. 654.

(*a*) *Ibid.*

death of the wife her personal representatives can have no claim for arrears for any part of a year (*b*), a claim for pin money being a personal one, different from other debts, and not surviving (*c*).

The question, however, as to the right to recover arrears of pin money, like the similar question as to the recovery of arrears of property settled to the wife's separate use, is one far from free from obscurity, and there are few recent decisions on the subject, questions of this kind probably being generally matters of arrangement.

(*b*) See, however, *Thomas v. Bennett*, 2 P. W. 341, where ten years' arrears of pin money were claimed by the wife's representatives, and refused, but upon the ground referred to in the next note, that she had been suitably maintained during that time.

(*c*) *Howard v. Digby*, 2 Cl. & F. 654. *Semble*, on the authority of this case and of *Thomas v. Bennett*, *ubi sup.*, the wife herself cannot recover any arrears if she be properly maintained during the period. See also as to arrears of separate estate, *supra*, p. 108.

## CHAPTER XV.

### JOINTURES AND DOWER.

UNDER the old law a widow was entitled to dower, that Old law.  
is to say, to the enjoyment for her life of one equal third part in severalty of all land of which her husband was seised for an estate of inheritance during the existence of the coverture. This right was valid even against purchasers for value from the husband, and if it was desired to bar this right, the land purchased by the husband was assured to the well-known "dower uses," the effect of which was, that the seisin of the husband was suspended during the coverture, though he had otherwise absolute control over the property. By an act passed in the reign of William IV., commonly called the Dower Act (*a*), the Dower Act.  
wife's right to dower has been put entirely under the

(*a*) 3 & 4 Will. 4, c. 105. By this act it is enacted as follows:—

(2.) "That when a husband shall die beneficially entitled to any land for an interest which shall not entitle his widow to dower out of the same at law, and such interest whether wholly equitable, or partly legal and partly equitable, shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession (other than an estate in joint tenancy), then his widow shall be entitled in equity to dower out of the same land.

(3.) "That when a husband shall have been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same if he had recovered possession thereof, she shall be entitled to dower out of the same, although her husband shall not have recovered possession thereof, provided that such dower be sued for or obtained within the

period during which such right of entry or action might be enforced.

(4.) "That no widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime or by his will.

(5.) "That all partial estates and interests, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts and engagements to which his land shall be subject or liable, shall be valid and effectual as against the right of his widow to dower.

(6.) "That a widow shall not be entitled to dower out of any land of her husband when in the deed by which such land was conveyed to him or by any deed executed by him, it shall be declared that his widow shall not be entitled to dower out of such land.

(7.) "That a widow shall not be entitled to dower out of any land



control of the husband, and it can only arise on the death of the husband, without having dealt with the property and intestate. On the other hand, it is thereby extended to equitable interests of the husband.

It is to be observed, that the well-known Statute of Uses (*b*) had previously incidentally effected a large increase of cases in which dower could be claimed by turning uses, *i. e.*, as they were then considered trusts, into legal estates, and the same statute provided that the wife's dower should be barred if a legal jointure had been given to the wife before marriage (*c*). If, however, the jointure was given to the wife after marriage by virtue of the provisions of the same act, she might elect whether she took the jointure or the dower (*d*).

Statute of  
Uses.

To bar the wife's dower under the Statute of Uses it was necessary that there should be a perfect jointure, and to the making of a perfect jointure within that statute six things, according to Lord Coke, had to be observed (*e*):—First, her jointure was to take effect for her life in possession of profit presently after the decease of her husband. Secondly, that it was for the term of her own life or a greater estate. Thirdly, that it must be made to herself and to no other for her. Fourthly, that it must be made in satisfaction of her whole dower, and not of part of it. Fifthly, that it must either be expressed or averred to be in satisfaction of her dower. And (*f*) sixthly, it was

of which her husband shall die wholly or partially intestate, when by the will of her husband, duly executed for the devise of freehold estates, he shall declare his intention that she shall not be entitled to dower out of such land, or out of any of his land.

(8.) "That the right of a widow to dower shall be subject to any conditions, restrictions or directions which shall be declared by the will of her husband duly executed as aforesaid.

(9.) "That where a husband shall devise any land out of which his

widow would be entitled to dower if the same were not so devised, or any estate or interest therein to, or for the benefit of his widow, such widow shall not be entitled to dower out of or in any land of her said husband, unless a contrary intention shall be declared by his will."

(*b*) 27 Hen. 8, c. 10.

(*c*) *Ibid.* s. 4.

(*d*) *Ibid.* s. 7.

(*e*) Co. Litt. 36 b.

(*f*) As regards the fifth requirement, there seems to be nothing said in the statute about the necessity of any such expression.

to be observed that it might be made either before or after marriage (*g*).

It was doubted whether or not evidence of assent by the woman to accept a legal jointure, given to her previously to marriage, is requisite so as to bar her dower. It has been said, that it would be a hardship if a jointure of nominal amount should so bar her. There was, however, no such qualification provided by the act (*h*). Dower barred by jointure.

In *Tinney v. Tinney* (*i*), Lord Hardwicke says that a general provision for a wife was not a bar of dower, unless expressed to be so. That, in the case of *Lawrence v. Lawrence*, Lord Somers held a devise of lands generally to the wife to be in bar of dower, but that it went up afterwards to the House of Lords, and the decree was reversed. In the case of *Vizard v. Langdale* (5 Geo. 1), Sir Joseph Jekyll held the words in a bond, to secure a sum of money for the wife's livelihood and maintenance, was no bar of dower, but the Lord Chancellor King was of opinion that it was a bar of dower, and said it was within the equity of the statute of Henry 7 of jointures, and, therefore, reversed Sir Joseph Jekyll's decree.

Express powers to jointure existing or future wives are usually given in modern settlements; formerly it was usual to give power to appoint a portion of the lands of a certain yearly value, which is sometimes called a legal jointure; but it is now the almost universal practice to give power to appoint a rent-charge of a certain value (*k*). Usual powers to jointure.

The power to appoint a jointure should be expressed to be capable of being exercised, so as either to bar the right to dower or not. A limitation of a jointure under a power is not necessarily a bar of dower, but if so expressed, or expressed to be made as for the maintenance of the wife, How far dower barred.

(*g*) If made after marriage the wife might elect to waive the jointure and claim her dower.

(*h*) *Drury v. Drury*, cited in *Caruthers v. Caruthers*, 4 Bro. C. C.

506.

(*i*) 3 Atk. 8.

(*k*) For forms of powers to jointure, see *S. C.*, Dav. Prec. vol. 3, pt. 2, and *Prideaux Conv.* vol. 2.

it may amount to such a bar (*l*) ; but as dower can only arise since the Dower Act (except as to the case of persons married previously to 1883), in case of an intestacy as to the land out of which it is claimed, these questions are scarcely of importance in regard to estates of sufficient value to be charged with jointures ; intestacy as to estates of considerable value being very rare, and the devolution thereof being generally completely provided for (*m*).

A woman not under disability may, of course, release her right to any dower previously to her marriage upon any term she may think fit (*n*).

The appointment made in pursuance of a power to jointure is generally expressed to be in lieu of all dower and freebench. Sometimes, however, it may be thought advisable not so to bar the wife's right to dower by her jointure, but to leave her in possession of that provision, so far as her husband may not think fit otherwise to deprive her of it (*o*).

Legal  
jointures.

It appears from *Hervey v. Hervey* (*p*), that where there is a power to settle and assure—that is, to convey a legal estate in hereditaments to a certain limit of value as a jointure—that in such cases the donee of the power cannot settle an annuity so that the whole estate be encumbered. A part of the property of the value required ought to be set apart to provide the jointure, not the whole to be charged with it.

In the case of a legal jointure, where the jointure is not to exceed in the whole the annual value of a fixed sum, it

(*l*) See *supra*; and cf. *Cody v. Cody*, 5 L. R., Ir. 620.

(*m*) A declaration against dower is sometimes inserted in purchase-deeds, but, as the only effect thereof is to favour the heir-at-law at the expense of the widow on an intestacy, it is better omitted.

(*n*) *Dyke v. Rendall*, 2 De G., M. & G. 209.

(*o*) Dav. Prec. vol. 3, pp. 311, 471.

(*p*) 1 Atk. 561. This was a case

of importance also on the question how far equity will aid a defective execution in a settlement of a power to jointure. The settlement raised numerous questions, and Lord Hardwicke says of the draftsman, "he does not seem to have committed blunders so much as wilful mistakes with a view to try experiments, like Serjeant Maynard's conclusion in some of the clauses of his will, "*Valcat quantum valere potest*."

seems that the value of the land is to be taken and estimated as it stood at the time of the power (*q*), and that if by any accident after the execution of the power there should be an excess, it would be for the benefit of the jointress; while, by parity of reason, if there should be any deficiency by inundation or casualties, the jointress must acquiesce under it, and that to construe it otherwise would make these powers desultory (*r*).

In the cases (now rare) where there is a legal jointure made under a power, and a certain portion of the lands assured accordingly, it seems that, in the absence of expressions in the power and in the appointment to the contrary, the jointure cannot be limited clear of taxes and usual outgoing for repairs and the like (*s*).

Jointures  
free from  
outgoings.

Where a power provided that the donee should in his lifetime be empowered by any deed or deeds, or by will, to settle upon any woman he should marry for her jointure a sum not exceeding 4,000*l.* per annum, without any deduction or abatement for any taxes, charges, or impositions, imposed or to be imposed, parliamentary or otherwise, subject nevertheless to leases in being at the time of such jointure being made, it was held, that the power could be so executed as to make the appointee entitled to such a jointure, free from all incumbrances, rent-charges, rents-seck, fee farms, quit rents, annuities, stipends, pensions, and procurations, and from all parliamentary taxes or impositions of such nature and kind as were in being at the time of executing the power, and from the land tax (*t*).

The uses of a settlement will not be treated as exhausted so long as there is a subsisting legal jointure, and consequently such a jointress will have an equity to have

Implied re-  
conversion  
during  
jointure.

(*q*) It seems doubtful, but the time of the execution of the power seems probably here meant; see *Lord Tyrconnel v. Duke of Ancaster*, *Ambl.* 239.

(*r*) Per Lord Hardwicke in *Marchioness of Blandford v. Duchess of Marlborough*, 2 *Atk.* 542.

(*s*) *Hervey v. Hervey*, 1 *Atk.* 561.

(*t*) *Marchioness of Blandford v. Duchess of Marlborough*, 2 *Atk.* 542.

money, subject to the trusts of the settlement, treated as re-converted into realty (*u*), and it will be so treated for all purposes accordingly (*x*).

It is the usual practice in framing what are called "name and arms clauses," and the like, specially to provide that jointures and unvested portions shall not fail, or be prejudiced on the shifting over of the estate (*y*).

Priority of  
annuity in  
lieu of dower.

By virtue of the old law, expressly preserved by sect. 12 of the Dower Act (*z*), an annuity given in lieu of dower to a widow has priority over other legacies, but in order to get such priority she must have become entitled to some dower, and this will not be the case where the whole real estate of the testator is free from dower, by reason of declarations against dower contained in the conveyances (*a*), or otherwise.

Cases sometimes occur, but rather under wills than settlements, as to whether a widow has or not a right of election as to dower, that is to say, whether she must accept a benefit given to her in lieu of dower, or can reject the benefit and claim her dower, but as these cases now can only arise where there is a partial intestacy or failure of disposition, this will probably not be of frequent occurrence (*b*).

(*u*) *Walrond v. Rosslyn*, L. R., 11 C. D. 640; 48 L. J., Ch. 602; 27 W. R. 723.

(*x*) In the case above cited it appears actually to have been against the interest of the jointress who was one of the next of kin to have it so treated.

(*y*) *Holmesdale v. West*, L. R., 12 Eq. 280; 40 L. J., Ch. 795.

(*z*) 3 & 4 Will. 4, c. 105.

(*a*) *Roper v. Roper*, L. R., 3 C. D. 714; 35 L. T. 155; 24 W. R. 1013.

(*b*) As to a widow's right of election as to dower under a will see *Fytche v. Fytche*, L. R., 7 Eq. 494; 19 L. T. 343; *Thompson v. Burra*, L. R., 16 Eq. 592; 42 L. J., Ch. 827. And see *supra*, p. 113.

## CHAPTER XVI.

### RAISING PORTIONS.

HAVING treated of jointure and dower, it is not out of place to consider next, the provisions made for the children by means of portions. As a matter of convenience, power is usually given to raise these by means as extensive as possible (*a*), including application in satisfaction thereof of the rents and profits of the estate, and power to sell or mortgage the corpus thereof (*b*).

Where there is this discretion to trustees it is hardly probable that they could incur any risk by using any of the modes allowed them, but questions of considerable difficulty may nevertheless arise as to the ultimate incidence of the burdens. Incidence of portions.

As a practical and common sense rule, it is usual to raise and pay annual sums out of the annual rents and profits (*c*), and gross sums out of the corpus of the estate (*d*).

But the trustees in such cases have a considerable discretion according to the circumstances of each case, and a charge of portions on the "profits" of an estate Charge on "profits."

(*a*) Dav. Prec. vol. 3, pt. 2; Prid. Conv. vol. 2.

(*b*) Mr. Davidson, in his Precedents, excludes express power to sell, though he conceives it probable that other means failing a sale may, nevertheless, be resorted to. Dav. Prec. vol. 3, pt. 1, p. 447.

(*c*) But the term "rents and profits" is capable of being held to

mean the *corpus* of the property. *Countess of Shrewsbury v. Earl of Shrewsbury*, 1 Ves. jun. 234 (where, however, there was no express power to mortgage); *Boodle v. Blundell*, 1 Mer. 232.

(*d*) Dav. Prec. vol. 3, pt. 1, p. 450; Jarman on Wills, 3rd ed. vol. 2, p. 582. And see *Playters v. Abbott*, 2 My. & K. 97; and *Ridout v. Earl of Plymouth*, 2 Atk. 104,

may not, necessarily, be confined to a charge on the annual income only, but may amount to a charge on the corpus. The natural meaning of the word "profits" in this sort of context is, it is true, annual profits; but when the charge has not been expressly restrained to annual profits, or it has not distinctly been shown that they were intended to be the exclusive object of the charge, equity has sometimes construed the word in its most extreme signification as a general charge on the land. In some cases, on the other hand, a sale or mortgage, though clearly within the terms of the charge, has been refused where the matter has been referred to the court. The circumstances that have chiefly influenced this discretion, are the appointment of a time within which the charge must be raised; the situation of the estate, if, for instance, a sale or mortgage, would be very prejudicial as in the case of a reversion, especially if it would occasion any danger, that the charge would not be paid in full; and the nature of the charge, as whether it is for debts or portions, and, in the latter case, the age or death of the child (e).

Ultimate  
incidence of  
charges.

The case of *Jones v. Jones* (f) is an important case, as to the principles upon which it ought to be decided how the ultimate incidence of the burden ought to be borne, where there is a discretionary trust to trustees to pay charges. In this case, which arose as to the incidence of fines payable for the renewal of leaseholds, and under directions contained in a will (g), a testator had devised successive interests for life in certain leaseholds for lives from time to time to be renewed, and the fines and expenses to be paid either out of the profits or by sale or

(e) *Earl of Albemarle v. Rogers*, 2 Ves. jun. 481. And see *Lingen v. Foley*, 2 Ch. Cas. 205; *Heycock v. Heycock*, 1 Vern. 256; *Berry v. Askham*, 2 Vern. 26; *Trafford v. Ashton*, 1 P. W. 415; *Ivy v. Gilbert*, 2 P. W. 415; *Mills v. Banks*, 3 P. W. 1; *Ridout v. Earl of Ply-*

*mouth*, 2 Atk. 104; *Stephens v. Dethick*, 3 Atk. 39; and *Smith v. Evans*, 1 Amb. 633.

(f) 5 Ha. 460.

(g) But *quære*, if there be any distinction as to cases of this class arising under wills and under settlements. See *ibid*.

mortgage of the premises. On the estate being administered by the Court of Chancery it was considered that the fines and expenses ought to be borne by the tenants for life and remaindermen, according to their actual enjoyment of the property (which obviously could not be ascertained until the death of each), and not in proportion to an extent of enjoyment of the estate to be determined speculatively or by calculation of probabilities (*h*). In this way, if a tenant for life of a term paid the whole amount for renewals in the first instance, his estate would have a lien for any over-payment he might make upon the residue of the term. There would, however, be more difficulty if the remainderman paid the fines, but in that case it would seem that the tenant for life might be required to give security, enforceable for the amount of his enjoyment when it became ascertained (*i*).

The court is reluctant to raise portions out of reversionary interests, but will do so when it is necessary, in order to satisfy the intention of the settlement (*k*). The court will, however, take hold of very small grounds from which to infer the intention of the parties to have been the other way (*l*). But that the court is competent and willing to do so upon proper occasion appears from many early cases, such as *Gerrard v. Gerrard* (*m*), *Greaves v. Maddison* (*n*), and others. But after considering these cases Lord Maclesfield, in the case of *Butler v. Duncombe* (*o*), decreed a portion, though vested, not to be raised out of a reversionary interest. Upon this occasion his lordship said:—  
“Though *Gerrard* and *Gerrard* and *Greaves* and *Maddison*

Portions  
raised out of  
reversions.

*Secus*, in  
some cases.

(*h*) *Ibid.* p. 464.

(*i*) *Ibid.*

(*k*) *Michell v. Michell*, 4 Beav. 549.

(*l*) *Michell v. Michell*, *ubi sup.*, p. 463; *Broome v. Berkley*, 2 P. W. 485.

(*m*) 2 Vern. 458.

(*n*) Cited in *Butler v. Duncombe*, 1 P. W. 452.

(*o*) *Ubi sup.* And see *ibid.* p.

453, n., where it was said that though *Gerrard v. Gerrard*, and *Greaves v. Maddison* have been constantly received as the law of the court, yet judges in later times have expressed their opinion of the inconvenience of those determinations, and have anxiously sought for circumstances to distinguish modern cases from them. And see cases there cited.



were strong cases, yet this case seems to go yet further; and as Lord Chancellor Cowper (whom his lordship was pleased to say he unequally succeeded), declared that if these cases had come before him he would not have gone so far, I, for my part, declare I'll not go a jot farther, but where things are settled and rendered certain it will not be so material how, as long as they are so, as that all people know how to act."

*Hall v.  
Carter.*

However, in *Hall v. Carter* (*p*) on the subject, Lord Hardwicke said as follows:—"The second question is whether the portions are raiseable out of this term, though a reversionary one? I am of opinion these portions ought to be raised immediately, notwithstanding the cases cited, for this stands clear and divested of all the circumstances mentioned in the others. There may be inconveniences on both sides, but on the side of the daughters (*i. e.*, the portionists) a very great one, for they may wait till their portions are of no use to them, as has happened in one instance here, for one of the daughters is dead, and her representative comes only in her right.

"In the case of *Corbet v. Maidwell* (*q*) Lord Cowper admitted all the precedent cases, and went upon the words of the settlement. . . . In the case of *Butler and Duncombe* the trust of the term was expressly from and after the commencement of the term, and upon these single words Lord Macclesfield founded his decree.

"Conveyancers now are grown so cautious as to insert negative words in settlements to prevent portions being raised in the lifetime of the father and mother."

*Immediate  
maintenance.*

Where there is a direct charge for maintenance on reversionary property, it will be raiseable immediately out of the property. In *Hall v. Carter* (*p*), where a sum of 6*l.* a year was given to the testator's daughters in respect of certain portions of 100*l.* secured for a term but not raiseable during the widow's wife, Lord Hardwicke said

(*p*) 2 Atk. 354.

(*q*) 2 Vern. 640.

that the maintenance was a charge upon the estate, and the trustees were to pay 6*l.* per annum to each daughter till their portions respectively became due and payable, and it was not to be postponed till after the term came into possession, for that maintenance ran on till then. And though he did not know any instance where a sale had been directed for maintenance out of rents and profits, because it must be annual, which would create endless trouble, yet it was a charge upon the estate, and the arrear which was incurred must be paid off after it came into possession; there could, therefore, be no objection in mortgaging the reversion nor harm to the reversioner, because the moment the term came into possession the arrears would have to be satisfied.

The costs of raising portions under a settlement are payable out of the estate, and it is well settled that trustees who have a power to raise a certain sum by mortgage for the benefit of a particular person, or class of persons, have also by implication power to raise the incidental costs by mortgage of the same property (s).

Costs of raising may also be raised.

Where there is a power of charging land with a gross sum it imports power to charge the land with interest thereon, as none would, of course, lend such sum if the law were otherwise (t).

Portions charged on real estate also carry interest in favour of the portionist from the time when they ought to be raised and paid (u), and this, perhaps, is to be assumed to be so as to all portions.

The rate of interest allowed will now be usually at the rate of 4*l.* per cent. It was the rule in Lord Hardwicke's time to give interest at the rate of 4*l.* per cent. on legacies out of real estate, but at the rate of 5*l.* per cent. on legacies out of personal estate, for the reason that the

Interest at 4*l.* per cent.

(s) *Michell v. Michell*, 4 Beav. 549; *Armstrong v. Armstrong*, L.R., 18 Eq. 541; *Parker v. Watkins*, Joh. 133.

(t) Per Lord Hardwicke, in *Hall v. Carter*, p. 358.

(u) *Earl Pomfret v. Lord Windsor*, 2 Ves. sen. 487.

Eccelesiastical Courts had allowed that rate (*x*), but now there is no distinction, and in either case the court allows interest at the uniform rate of 4l. per cent. (*y*).

There is often a considerable difficulty as to how soon portions can be compelled to be raised, whether it be on the application of the persons entitled thereto, or on that of the persons entitled to the estate, subject to the portions who may be desirous of having the estate cleared.

How soon  
portions are  
raiseable.

In *Sheppard v. Wilson* (*z*), there was a charge of 10,000l. for younger children, with power to give them respectively maintenance to an amount not exceeding 5l. per cent. on their shares. The eldest brother, being the devisee subject to the portions of the estate, filed his bill to have them raised and set apart before any of them were payable, and it was held, that the children ought not to be deprived of the security of the land, or have their right to maintenance reduced to the rate (perhaps) of 3l. per cent. instead of 5l. per cent. by the raising of their portions and investment thereof in the funds.

Shortly afterwards two of the children became entitled to their portions by reason of their marriage, and it was held, further, that even then their two shares only were to be raised, and that only the portions wanted ought to be raised, it being not necessary to raise all the portions when one or two were payable (*a*).

In *Leech v. Leech* (*b*), however, where there was a term of 500 years to raise portions, it was held that the whole sum was raiseable when some only of the portions were required, and on the elder children becoming entitled the portions of those remaining infants were directed to be raised and transferred to their separate credit, with liberty

(*x*) *Bryant v. Speke*, 1 Ves. sen. 171.

(*y*) In view of the decreased rate of interest now obtainable on investments, it may be that the rate of 4l. per cent. may come to be regarded as excessive.

(*z*) 4 Ha. 392. See also on the point, *Dickinson v. Dickinson*, 3 Bro. C. C. 19; and *Winton v. Bold*, 1 Sim. & St. 507.

(*a*) Per Wigram, V.-C., in *Sheppard v. Wilson*, *ubi sup.*

(*b*) 2 Dr. & War. 568.

to apply for payment on their attaining twenty-one years (c).

And in *Marsh v. Keith* (d), Lord Romilly held the owner of an estate charged with portions entitled to pay off the whole charge when a part was payable, and commented on the hardship of having to pay off portions piecemeal.

When all portions payable at once.

In *Gillibrand v. Goold* (e), upon part of a sum of 10,000*l.* charged for portions on land becoming raiseable it was held that the whole was to be raised by one mortgage, the shares of those not yet entitled to payment to be invested for them in the funds; and though it might be said that some of the shares might eventually in this way be diminished (if the price of the funds fell), yet that the court held investment in the Three per Cents as equivalent to payment, and if there was any rise in the funds the shares would have the benefit of it.

One of several portionists entitled in undivided shares to the estate, upon which the portions are charged, is not entitled to have the entire charge thrown in separate portions on the estate, instead of having it raised out of the entirety (f).

The question as to allowing interest for maintenance to children upon portions not yet payable to them, there being a general direction for maintenance, was much considered by Sir William Grant in *Lyddon v. Lyddon* (g), where it was allowed.

When interest allowed for maintenance.

(c) *Ibid.*, per Lord St. Leonards.

(d) 29 Beav. 625.

(e) 5 Sim. 149, per Shadwell, V.-C.

(f) *Otway-Cave v. Otway*, L. R., 2 Eq. 725; 15 W. R. 6.

(g) 14 Ves. 565. The question in the case was, whether the younger children were entitled to interest upon the provision made for them by a settlement executed upon the marriage of their parents from the death of the father, or only from that of the mother, who survived. There was a term to raise portions to take effect immediately from the death of the father,

but subject to, and after the expiration of, an annuity to the widow. The trustees had the legal right to the surplus rents after satisfying the annuity, as the term was precedent to the limitation to the first and other sons. It was held, that though they were not to raise the principal until after the death of both the father and mother, yet interest was given for maintenance until, and consequently before, the portions should be due and payable. The children were equally in want of maintenance during the mother's life as after her death. If, indeed, the estate had been

Discretion of  
trustees.

Where, as is frequently the case, trustees have a discretion to apply for maintenance a sum not exceeding the whole or a certain proportion of the interest or dividends on a portion, they have clearly, in the absence of *mala fides*, a discretion not to raise the full amount (*h*).

Where, however, a female infant was entitled to maintenance both out of settled property in which she had a future and partial interest, and out of sums of stock to which she would become absolutely entitled, it was held that she could insist (as it would be for her benefit), on having the maintenance raised out of the settled property and the dividends on the stock accumulated (*i*).

limited to her for her jointure, it might have been argued that the limitation for maintenance could not take effect until the term should come into possession. But even in that case it would have been doubtful whether strong and general words would not warrant raising maintenance by sale or mortgage of the reversion, or, at least, raising it afterwards retrospectively; but, inasmuch as the trustees had the legal right to the rents and profits, and interest was

expressly given for maintenance until the portions should become due and payable, it would have been equally contrary to the words and the spirit of the settlement, to hold that the maintenance should not take place until after the death of the mother.

(*h*) Per Shadwell, V.-C., in *Lyon v. Lord Coventry*, 14 Sim. 47.

(*i*) *Ibid.* And further as to maintenance, see *infra*, S. C., Chap. XXVII.

## CHAPTER XVII.

### THE VESTING OF PORTIONS.

QUESTIONS as to the vesting of portions arise perhaps more frequently under wills than under settlements, and for a more detailed consideration thereof than can be here given the reader is referred to works dealing more directly with the subject (*a*).

The question of vesting involves, of course, the question of the devolution of the property on the death of the person interested, and much hardship has been sometimes felt where a person interested in property has died leaving children, and they have been deprived of their share by reason that it had not vested in their parent.

This is particularly the case where a life tenancy having been created there are words of survivorship added to the gift to those in remainder, and in this way one of several children or other legatees may, to the great prejudice of his representatives, lose his interest should he not survive the tenant for life.

Effect of  
words of sur-  
vivorship.

There is a series of authorities which establish that, as regards marriage settlements, and also as regards post-nuptial settlements, containing a recital of an intention to provide for all the children of the marriage, you are not, as a general rule, to read the instrument in such a way as to make the provision for a child depend upon his surviving the parents (*b*).

(*a*) See *S. C. Jarman on Wills*; *Theobald on Wills*, etc.

(*b*) Per Jessel, M. R., in *Day v. Radcliffe*, L. R., 3 C. D. 654, 657; 24 W. R. 961.

The rule exists to prevent children of a child of the marriage being left entirely without a provision in consequence of the death of that child during the lifetime of his parents, a result against which the court struggles and which can rarely have been intended (c).

If, however, the settlement clearly and unequivocally makes the right to a provision depend on survivorship the rule does not apply (d).

Court leans  
in favour of  
vesting.

In cases of doubtful construction of the words the court will, in the cases above mentioned, lean to the construction which includes the whole class (e).

The time when a fund is "payable," with regard to survivorship, is the period of distribution, not the period of vesting (f).

Especially in  
ambiguous  
settlements.

That an incorrect and ambiguous settlement may be construed, as vesting portions at the age of twenty-one against words importing a condition of surviving the parents, is shown by the decision of Sir W. Grant in *Howgrave v. Cartier* (g), where he says:—"If the settlement clearly and unequivocally make the right of the child to a provision depend upon its surviving both or either of the parents, a Court of Equity has no authority to control that disposition. If the settlement is incorrectly or ambiguously expressed, if it contains conflicting and contradictory clauses so as to leave in a degree uncertain the period at which, or the contingency on which, the shares

(c) *Hope v. Lord Clifden*, 6 Ves. 499; *Currie v. Larkins*, 4 D., J. & S. 245; *Woodcock v. Duke of Dorset*, 2 Bro. C. C. 569; *Emperor v. Rolfe*, 1 Ves. sen. 208.

(d) *Jeyes v. Savage*, L. R., 10 Ch. 555, 563; 44 L. J., Ch. 706; 33 L. T. 139; 23 W. R. 764; reversing *S. C.*, 23 W. R. 742; *Howgrave v. Cartier*, 3 V. & B. 79; *Whatford v. Moore*, 3 My. & Cr. 270; *Wingrove v. Palgrave*, 1 P. W. 401; *In re Watson's Trusts*, L. R., 10 Eq. 36; 39 L. J., Ch. 770; 18 W. R. 642; *Bythesea v.*

*Bythesea*, 23 L. J., Ch. 1004.

(e) *Whatford v. Moore*, 3 My. & Cr. 270; *Howgrave v. Cartier*, 3 V. & B. 79.

(f) *Day v. Radcliffe*, *ubi sup.* But see *Haydon v. Rose*, L. R., 10 Eq. 224; 39 L. J., Ch. 688; 23 L. T. 334; 18 W. R. 1146; *Salisbury v. Lambe*, 1 Eden, 465; *Hallifax v. Wilton*, 16 Ves. 168; *Walker v. Main*, 1 Jac. & W. 1; *In re Wilmott's Trusts*, L. R., 7 Eq. 532; 38 L. J., Ch. 273; 17 W. R. (Dig.) 153.

(g) *Ubi sup.* p. 85.

are to vest, the court leans strongly towards the construction which gives a vested interest to the child when that child stands in need of a provision—usually as to sons at the age of twenty-one, and as to daughters at that age or marriage.”

The above extract shows, as has been already stated, that a settlement may be so clearly worded as to leave no room for the application of the above principle, but the court will yet go to great lengths to mould the language to suit the intention (*h*).

Charges on land of the nature of portions, or legacies if made payable at a certain age, or on a certain event, such as marriage or other event, personal to the person intended to be benefited thereby, if the person die before the time arrives, or the event happens, sink into the estate for the benefit thereof, and are not raiseable (*i*); but if the payment is to be postponed till the happening of an event not referable to the person to be benefited, but to the circumstances of the estate, such as the death of the tenant for life then they will be raiseable (*h*).

When charges sink into the land.

On settlements by a person *in loco parentis*, there is a further tendency on the part of the courts in order to effectuate the presumed intention of the settlor to struggle to construe the provisions of the settlement (at all events, where there is any ambiguity of language), so as to make interests of children vest at the time when it would usually be convenient for their requirements that they should vest. So where, in such a case, the words strictly imply that a

Settlements by person in loco parentis.

(*h*) See *Emperor v. Rolfe*, 1 Ves. sen. 208; *Swallow v. Binns*, 1 K. & J. 425. And see generally on the subject, *Woodcock v. Duke of Dorset*, 3 Bro. C. C. 569; *Hope v. Lord Clifden*, 6 Ves. 499; *Schenck v. Legh*, 9 Ves. 300; *Powis v. Burdett*, 9 Ves. 428; *Bayard v. Smith*, 14 Ves. 470; *Jefferies v. Reynolds*, 6 Tomk. P. C. 398; *Randall v. Metcalfe*, 3 Tomk. P. C. 318; and *Wingrave v. Palgrave*, 1 P. W. 401.

(*i*) Dav. Prec. vol. 3, pt. 1,

p. 48; *Evans v. Scott*, 1 H. L. 57.

(*k*) *Emperor v. Rolfe*, *ubi sup.*; *Cholmondeley v. Meyrick*, 1 Eden, 77, 85. And see *Powlet v. Powlet*, 1 Vern. 204; *Hinchinbrook v. Seymour*, 1 Bro. C. C. 398; *McQueen v. Farquhar*, 11 Ves. 457; *Bruen v. Bruen*, 2 Vern. 438; *Lord Teynham v. Webb*, 2 Ves. sen. 198; *Whatford v. Moore*, 3 My. & Cr. 270; *Fry v. Lord Sherborne*, 3 Sim. 243, 259; and *Remnant v. Hood*, 27 Beav. 74, 78.



child should both attain twenty-one years and survive his parents, as a necessary condition of receiving a provision, yet a child dying previously to his parents, but having attained twenty-one years, may take, and though the words may be strong and difficult to manage, yet the intention of the settlement is the truth and honour of the case (*l*).

Where no occasion for portion.

On the other side, there have been cases where a child having died so young, that portions could never be required for him, the court has not decreed the portion to be raised, on the ground that there is no occasion for it (*m*).

But a daughter who attains twenty-one years of age, and died in her father's lifetime, without having been married, was held entitled (*n*).

As regards classes, though the words of the instrument may render necessary the survivorship of some members of the class to enable any member to take, yet the contingency upon which the gift is to take effect is not to be imported into the constitution of the class who are to take under the trust itself (*o*).

Successive powers to portion.

It has been decided, that where there are successive powers to portion younger children of successive tenants for life, the powers (though the circumstances would admit of it, as by the death of the second tenant for life having children in the lifetime of the first tenant) are not exer-

(*l*) *Hougrave v. Cartier*, 3 V. & B. 79; *Woodcock v. Duke of Dorset*, 3 Bro. C. C. 569. In the latter case the words of the settlement were to the effect that, if the parents should leave at the death of the survivor any child or children, then the trustees were to raise the yearly sum of 200*l.* for the maintenance of such child or children till the age of twenty-one years, and then were to raise 5,000*l.*, and pay the same to such children in equal shares; and if there should be but one such child, then to such child only. There were two

children, one of whom attained twenty-one years of age and died in her mother's lifetime, and it was held that she had become entitled to a moiety of the 5,000*l.*

(*m*) *Bruen v. Bruen*, 2 Vern. 438; *Preco. Chanc.* 195; *King v. Withers*, Cas. t. Talb. 195.

(*n*) *Davies v. Huguenin*, 1 Hem. & Mill. 730.

(*o*) *In re Orlebar's Settlement*, L. R., 20 Eq. 711; *Wilson v. Mount*, 19 Beav. 292; *Bythessa v. Bythessa*, 23 L. J., Ch. 603; *Boulton v. Beard*, 3 D., M. & G. 608; *Bell v. Pritchard*, 5 Ha. 567.

ciseable, as a rule, during the existence of a previous life-tenancy (*p*).

Where there was a covenant by a father in his daughter's marriage settlement not to exercise a power so as to diminish her portion under the father's marriage settlement, it was held to be too clear to admit of argument that the covenant amounted to a release *pro tanto* of the power, though it was attempted to be proved that the only remedy was on the contract for damages against the covenantor (*q*).

Where a tenant for life having power to charge the estate with portions for younger children mortgaged his life interest and covenanted that he would not afterwards charge the estate with portions to the prejudice of his mortgagees, it was held that he could not afterwards so charge his estate (*r*).

Covenant not to charge portions.

(*p*) *Lawton v. Swetenham*, 18 Beav. 98.

(*q*) *Davies v. Huguenin*, 1 Hem. & Mill. 730, per Lord Hatherley, then V.-C. Wood. And see *Green v. Green*, 2 J. & Lat. 529; *Horner v. Swann*, T. & R. 430; *Re Chambers*, 11 Ir. Rep. 430.

(*r*) *Hurst v. Hurst*, 16 Beav. 372. And see *Hole v. Escott*, 2 Keen, 444; *Noel v. Lord Henley*, M'Cl. & Y. 302. But see *Whitmarsh v. Robertson*, 1 Coll. 570; and *Jones v. Winwood*, 10 Sim. 150; 3 M. & Wels. 653.

## CHAPTER XVIII.

### THE ULTIMATE TRUSTS.

Husband's  
property to  
husband and  
wife's to wife.

By the ultimate trust in a settlement is meant usually the trust of the settled fund, which is declared to take effect on failure of the trusts for which the settlement has been made—that is to say, in the case of a marriage settlement, in the event of both husband and wife being dead and there being no issue of the marriage. The usual ultimate trusts are, as to property brought into settlement by the husband, for him absolutely, and as to property brought into settlement by the wife, in case her husband survive her, for the statutory next of kin, as if she had never been married, and in case she survive her husband, for her absolutely (a).

When trust  
should be for  
wife's next  
of kin.

It being the object, on failure of the trusts of the marriage settlement, to leave the parties as much as possible in the situation in which they were before the execution of the settlement, it follows that the wife's property, in default of issue and after the husband's death, should be limited to her absolutely and not to her next of kin, as otherwise she may take only a life interest in her own funds. Thus, where a *feme sole*, in contemplation of marriage, settled part of her fortune in trust to pay the dividends to herself for her separate use for life, and after her

(a) This method, which though usual has frequent exceptions, seems to follow the analogy of the law as to resulting trusts, and to give back as far as possible to the grantor what he has given for a particular purpose on failure thereof. Where a fund is settled on a mar-

riage by a person other than the husband and wife, this view might probably influence the moulding of the devolution of the ultimate trust thereof, so as to give back to him the fund on failure of the trusts of the marriage; but the author is not aware that this is usual.

death to her intended husband, and after the death of the survivor to transfer the capital according to her appointment by will, and in case she should die without appointment and her husband should be then dead, in trust for her next of kin according to the Statute of Distributions, it was held that she had on her husband's death a life interest only with a power of disposition by will, and a bill by her, praying that the funds might be transferred to her, was dismissed (*b*).

But a person having a general power of appointment by will, if he executes the power makes the appointee a trustee for the debts of the donee of the power (*c*).

In ordinary conversation, and even in the draftsman's instructions, the term "next of kin" is usually used to denote the class which takes, under the Statute of Distributions (*d*), the personal property of the intestate. In strict language, however, and in construction of law, the term "next of kin" means nearest of kin, independently of the statute, and it may be necessary, in order to make the term bear the intended meaning, to add the words "according to the statute," or the like, or some reference to an intestacy (*e*). The authorities have settled distinctly that the words "next of kin," without more, mean the nearest blood relations of the *propositus* (*f*), the effect being that there is no representation of a deceased brother or sister in such a case.

So where a testator gave a legacy to his daughter for life, and in default of issue for her "next of kin in blood as if she had died unmarried," and the daughter died without issue, it was held that the only surviving sister of

(*b*) *Anderson v. Dawson*, 15 Ves. 532. In a later somewhat similar case the settlement was rectified (on proof of the intention of the parties), so as to give the wife the fund absolutely on the husband's death and failure of issue. See *Wolterbeck v. Barrow*, 23 Beav. 423.

(*c*) *Williams v. Lomas*, 16 Beav. 1.

(*d*) The principal act, usually

styled the Statute of Distributions, is the 22 & 23 Car. 2, c. 10. It is amended or explained by the 29 Car. 2, c. 3, § 24, and by the 1 Jac. 2, c. 3, §§ 6, 7.

(*e*) *Jarman on Wills*, 3rd ed. vol. ii. p. 94.

(*f*) Per Lord Hatherley (then L. J. Wood) in *Halton v. Foster*, L. R., 3 Ch. 506.

the daughter was entitled to the legacy, in exclusion of issue of deceased brothers and sisters; for that the words did not point to the mode of distribution in cases of intestacy, and "next of kin," therefore, must be taken to mean nearest relations, and not persons entitled as next of kin according to the statute (a).

Whether next of kin are joint-tenants or tenants in common.

The wording of the Statute of Distributions (b) makes the persons taking under it on intestacy tenants in common, and not joint-tenants; and doubts have frequently occurred whether a reference to the statute in a settlement or will is or not sufficient to create the persons taking by virtue of such reference tenants in common in cases where they would naturally take otherwise as joint-tenants (c).

It was formerly thought that a simple reference to the statute was not sufficient to prevent the next of kin taking as joint-tenants. In *In re Greenwood's Trusts* (d), where the gift was to the testator's next of kin according to the statute, Stuart, V.-C., was of opinion that the next of kin took as joint-tenants, and that the reference was merely for the purpose of indicating the class who were to take. The same Vice-Chancellor, in a subsequent case (e), drew a distinction between the case where the language of the gift referred to the statute simply to find the individuals, and where it referred to the statute also to define their title.

Reference to statute creates tenancy in common.

More recent cases (f), however, appear to have settled that in most cases the term "next of kin according to the statute," or the like, will create a tenancy in common; and that where, either in a will or in a settlement, there is

(a) *Halton v. Foster*, L. R., 3 Ch. 505. As will be seen from this case the term "next of kin" by itself does not allow even of the limited representation admitted by the Statute of Distributions, that is to say, in the case of brothers' children; and under such a designation the parents and children of the *propositus* will take concurrently.

(b) 22 & 23 Car. 2, c. 10.

(c) This is often a question of

great importance, as the right to take by survivorship depends upon it.

(d) 31 L. J., Ch. 119.

(e) *Horn v. Coleman*, 1 Sm. & Giff. 169.

(f) *Bullock v. Downs*, 9 H. L. C. 1; *In re Ranking's Settlement*, L. R., 6 Eq. 601; 17 W. R. (Dig.) 124, 155, where *Horn v. Coleman* (*ubi sup.*) and *In re Greenwood's Trusts* (*ubi sup.*) were not followed.

a reference to the statute, the statute regulates the nature of the interest as well as the persons who are to take under it, unless there are words in the instrument excluding this construction. With reference to the ultimate trust in favour of the wife's next of kin, it may be well to notice that this class should be described as that which would have taken if the wife had died without having been married. The terms "unmarried" or "not married" are analogous, and are applicable to a widow as well as to a spinster, and under such words the children of the wife may take the fund as next of kin of the wife, though they do not live to the required age or (if it be so) marry, so as to become entitled under the particular trusts of the will. In this way, if an infant child survive the mother and die, the surviving husband would take the fund as next of kin of his child, which is probably rarely intended. The term "unmarried" is indeed flexible, and may mean "never having been married" where the context requires it; but it would be unwise to trust to such an interpretation being put upon it (g).

Meaning of term "unmarried."

It is to be observed that the court may be at liberty to change "and" into "or," or "or" into "and," when it sees some very unreasonable result will follow if this is not done (h).

The ultimate trusts of the husband's property are to him absolutely, or to him, his executors, administrators and assigns, the latter words, though usual, being merely words of limitation, and in fact surplusage (i).

A trust for the next of kin of the husband is obviously improper, and (unless the deed were reformed for mistake)

Trust for next of kin of husband wrong.

(g) *In re Sanders' Trust*, L. R., 1 Eq. 675. And see *Mitchell v. Colls*, Joh. 674; *S. C., Clarke v. Colls*, 9 H. L. C. 601; *Secombe v. Edwards*, 28 Beav. 440. However, in *Bell v. Phyn* (7 Ves. 458) Sir Wm. Grant held the expression "without being married" in a will equivalent to "without ever

having been married;" and in *Maberley v. Strobe*, Lord Alvanley held a similar view. And see *Sturgess v. Crosby*, 2 Coll. 746; and cf. *Willis v. Plaskett*, 4 Beav. 208.

(h) *In re Sanders' Trusts*, *ubi sup.*

(i) *Avern v. Lloyd*, L. R., 5 Eq. 383; 37 L. J., Ch. 225; 17 L. T. 376; 16 W. R. 669.

would give him only a life interest in his own property after his wife's death and failure of issue, which, it may be said, is never intended. A life interest, however, to the husband, followed by a gift to his executors, administrators and assigns, by analogy to the rule in *Shelley's case* (k), gives the donee an absolute interest (l).

Where appointment creates fresh interest.

*Lee v. Olding.*

Usually the ultimate trusts are limited only to take effect in default of exercise of a power of appointment to the contrary. On this head it is noticeable that, although an interest may have already vested in default of appointment, yet that interest is defeasible, and an appointment of the like interest to the same person creates a fresh interest at the date of the appointment, which may not be affected by intermediate incumbrances. In *Lee v. Olding* (m), a fund by a marriage settlement was settled upon the trust for the husband and wife successively for life, and then upon trust for such one or more of their children as they jointly or the survivor should appoint. There were two children of the marriage, one of whom died, and the wife died, leaving the other child surviving. The surviving child became bankrupt, being then entitled to the whole fund in default of appointment; he subsequently obtained his certificate, and two days afterwards his father appointed to him the whole fund. It was held by Stuart, V.-C., that the right to the property was only acquired under the appointment, and that it did not pass to the assignees on bankruptcy.

This case was followed in the very similar case of *In re Visard's Trusts* (n), which was affirmed on appeal, one of the two Lords Justices, however, declining to give his opinion (o).

(k) 1 Rep. 219.

(l) *Avern v. Lloyd*, *ubi sup.*

(m) 25 L. J., Ch. 580; 2 Jur., N. S. 850.

(n) L. R., 1 Eq. 667; 14 L. T. 182; 35 L. J., Ch. 460; 17 W. R. (Dig.) 50. On appeal, *S. C.*, L. R.,

1 Ch. 588.

(o) Knight Bruce, L. J. Presumably he was of a different opinion, but the result would have been the same had he delivered it: the court being equally divided the original decree would have stood.

In a subsequent and somewhat similar case, differing, however, from those last referred in the fact that it did not arise in bankruptcy, Malins, V.-C., felt bound to follow the decision in *Lee v. Olding* (*p*), and he decided accordingly, though not without some reluctance (*q*).

The law as thus settled seems certainly very technical, especially when, as happened in the three cases last cited, the legatee takes exactly the same interest in amount by the appointment as he would have taken on default of appointment; and it is possible that these cases might be thought of doubtful authority if reviewed in the House of Lords; a contrary rule, however, would probably be found, when the results were worked out in special cases, to be equally open to criticism.

Technicality  
of rule.

The decisions in these cases are, it may be observed, consistent with an old case (*r*), and seemingly, it must be added, a very hard one, in which it was decided that an appointment by will of a property to a person having already a vested interest therein in default of appointment, made the interest of the appointee contingent on his surviving the appointor.

(*p*) *Ubi sup.*  
(*q*) *De Serre v. Clarke*, L. R., 18 Eq. 587; 43 L. J., Ch. 821; 31 L. T. 161; 23 W. R. 3. And see *In re Frowd's Settlement*, 10 L. T., N. S. 367; 4 N. R. 54. And see also on the subject, *Sweetapple v.*

*Horlock*, L. R., 11 Ch. D. 745; 48 L. J., Ch. 660; 41 L. T. 272; 27 W. R. 865; *In re Jackson's Will*, L. R., 13 Ch. D. 190; 49 L. J., Ch. 82; 41 L. T. 499; 28 W. R. 209.

(*r*) *Duke of Marlborough v. Lord Godolphin*, 2 Ves. sen. 61.



## CHAPTER XIX.

### DOUBLE PORTIONS.

Double portions avoided.

It is usually intended in marriage settlements that no one child shall, by reason of alteration of circumstances, receive a double portion at the expense of his brothers and sisters.

In cases where such an event is likely to arise—for instance, where it is desired to make what is commonly called an “eldest son”—express clauses, intended to prevent a younger child who becomes an eldest child from taking a portion both as eldest child and also as one of the younger children, and the like, are usually inserted for the purpose of carrying into effect the great object of the parties in making a provision for children, namely, that no child should obtain a double portion at the expense of another; and these clauses ought to be so construed and dealt with as to promote the objects for which they are introduced, and which they are intended to serve (*a*).

Ambiguous words moulded to avoid double portions.

To effect this object, clauses ambiguously worded may be moulded by the court, even so as to do great violence to the language. On this principle, although it should be in terms said in the instrument that the eldest child is not to have a portion, yet if the first-born child does not take the family estates, which go to a younger child, then such younger child is considered to be the elder child for the purposes of the settlement, so as not to take a portion, and the elder child is considered to be a younger child, so as

(*a*) Per Lord Westbury in *Collingwood v. Stanhope*, L. R., 4 H. L. 57; 17 W. R. 517.

to have the benefit of a portion (*b*), and the doctrine applies alike both to realty and personalty (*c*).

So, if the elder child, entitled during the life of his parents to the estate in reversion, predecease his parents, so that that which was only a right in reversion never becomes an actual right in possession, and he never becomes owner of the estate, but as regards ownership the second son becomes the elder, it has been held that the elder son (by birth), through the medium of his executors, becomes entitled to a share in the provision intended for those who did not take the family estate (*d*).

As a rule, the period of distribution, and not the period of vesting, is the time when the clause of exclusion of the person holding the character of "eldest child," or as may be, is to take effect. Thus, where a testator gave funds to his daughter for life, and after her death among her children, except an eldest son, it was held that the period for ascertaining who had the character of an eldest son was the period of distribution, and not the death of the testator (*e*).

Where character of "eldest son" ascertained.

In one case, however, arising under a will, and in which the testator was *not* held to be *in loco parentis*, it was held that the vesting of shares was not postponed till the period of distribution, and that the time of vesting, not of distribution, was the period for ascertaining whether a child was an eldest son (*f*); and similarly it was held that where there was a declaration of trust funds in favour of a lady for life, and to be equally divided after her decease between her younger children, excluding the eldest child, who was well provided for, it was held that the children took

(*b*) *Ibid.*

(*c*) *In re Bayley's Settlement*, L. R., 6 Ch. 590; 25 L. T. 249; 19 W. R. 789. Affirming, *S. C.*, L. R., 9 Eq. 491; 39 L. J., Ch. 388; 22 L. T. 195; 18 W. R. 481.

(*d*) *Ellison v. Thomas*, 1 De G. & Sm. 18; *Collingwood v. Stanhope*, *ubi sup.*; and cf. *Reid v. Hoare*, L. R., 26 C. D. 363.

(*e*) *Matthews v. Paul*, 3 Swanst. 328. See also *Lord Teynham v. Webb*, 2 Ves. sen. 198; *Duke v. Doidge*, *ibid.* 203, n.; *Swinburne v. Swinburne*, 17 W. R. 47; *Adams v. Beck*, 25 Beav. 648; *In re Theed's Trusts*, 3 K. & J. 375; *Livesey v. Harding*, 2 H. L. C. 419.

(*f*) *Adams v. Adams*, 25 Beav. 562; cf. *Domville v. Winnington*, L. R., 26 C. D. 382.

vested interests at birth, and that it was to be determined who were to be considered younger children at the date of vesting (g).

An eldest daughter may be held to be a younger child.

The "prodigious latitude of construction" (h) adopted in these cases to answer the occasions of families and intent of the parties, so as to construe an eldest daughter, for instance, to be "a younger child," and which, as has been seen above, will mould the interpretation of such expressions as "younger children," "eldest child," and the like, in such a way as to carry out the presumed intentions of the heads of families, is limited, it is conceived (i), to cases where the settlor is *in loco parentis*, and may be assumed to have had in mind the equal benefit of the whole family. This is the usual rule in marriage settlements. Stricter rules of verbal construction may not improbably prevail where the settlor is a stranger (k).

Where settlor in loco parentis.

Whether one person is *in loco parentis* to another seems to depend not so much on the circumstances as on the intention. The proper definition of a person *in loco parentis* to another, is a person who means to put himself in the situation of the legal father of the child with reference to the father's office or duty of making provision for the child (l).

On the other hand, not every act done by a parent is to be considered on a different principle from an act done by a stranger, but only such acts as a parent does in fulfilment of parental duty (m). And a grand-parent making provision by will for children is not necessarily in so doing acting *in loco parentis* (n).

Different doctrine as

There is the widest possible distinction as to construction

(g) *Adams v. Roberts*, 25 Beav. 568.

(h) See per Lord Hardwicke in *Lord Teynham v. Webb*, 2 Ves. sen. 210, and in *Hale v. Hower*, Ambl. 203; and cf. *Dav. Prec.* vol. 2, pt. 1, pp. 426 *et seq.*

(i) But see *contra*, *Sug. Pow.* 8th ed. 680.

(k) See, among other cases, *Lyd-*

*don v. Ellison*, 19 Beav. 565.

(l) Per Lord Cottenham in *Powys v. Mansfield*, 3 My. & Cr. 359; *S. C.*, 6 Sim. 518.

(m) See per Maule, J., in *Scarbrick v. Skelmersdale*, 4 Y. & C. 78, 116. And see *Hale v. Hower*, Ambl. 203.

(n) *Lyddon v. Ellison*, 19 Beav. 565.

between the cases (apparently somewhat similar) where the question, on the one hand, is whether the court, upon the whole provisions of a marriage settlement, is to interfere (even to some extent of forced construction) so as to secure equality among children, and, on the other, the class of cases where there is a limitation of two estates, one of which is intended to shift in the event of the other being held by the same member of the family. In the latter case, the wording of the condition on which the shifting clause is to take effect must be strictly performed (o).

to shifting clauses.

As has been suggested above, the exclusion of a second son becoming entitled as eldest son for the time being to the principal family estate from a second estate, given to him as a second son, is regarded on principles different from those applied to cases of double portions, and such clauses of exclusion are construed strictly, so as not to come into effect in the event of the precise facts contemplated arising. In such cases, as a rule, it is necessary that the principal estate should be taken under the same title, and in the same quantity as was contemplated by the person who directed that on the taking thereof the second estate should shift. Thus, a clause directing that A., a younger son, shall forfeit Whiteacre if he become possessed of Blackacre (the property intended for the elder son), will not take effect if the latter property should be taken out of settlement, and should eventually pass to A. by conveyance from a stranger (p).

Shifting clauses strictly construed.

In such cases, the mention of "entailed" or "settled" estates is not merely a historical description of a pre-

(o) See per Lord Hatherley (reversing himself) in *Collingwood v. Smith*, L. R., 4 H. L. 52; S. C., L. R., 4 Eq. 286; 17 W. R. 517. And see next Chapter on "Shifting Clauses." And cf. *Reid v. Hoare*, L. R., 26 C. D. 363; and *Domville v. Winnington*, *ibid.* 383.

(p) *Harrison v. Round*, 2 De G., M. & G. 190; *Monypenny v. Dering*, *ibid.* 145; *Micklethwaite v. Micklethwaite*, 4 C. B., N. S. 790; *Fazakerly v. Ford*, 4 Sim. 390; *Taylor v. Earl of Harewood*, 3 Ha. 372; *Rumbold v. Rumbold*, 3 Ves. 65.

existing fact, but is intended to show the title under which the event is to take place (q).

Effect of  
re-settlement  
of principal  
estate.

A re-settlement, however, of an estate may practically amount to a continuation of the same title, and it is a question, dependent on the circumstances of each case, whether the identity of title has been destroyed (q).

Where a part of the "settled" estate has been sold, and such estate is accordingly of diminished value, there is a further strong argument against the event on which the shifting clause is to take effect arising (r).

(q) Per Selborne, L. C., in *Meyrick v. Laws*, L. R., 9 Ch. 242; 43 L. J., Ch. 521; 30 L. T. 77; 22 W. R. 341.

(r) *Gardiner v. Jellicoe*, 12 C. B., N. S. 568; *Meyrick v. Laws*, *ubi sup.*

## CHAPTER XX.

## SHIFTING CLAUSES.

It is not unusual for a settlor to desire to make an estate limited by the settlement defeasible in certain events. There is no limit to the number of contingencies upon which this may be desired. One of the most usual cases is where the settlor desires a person taking under the settlement to assume a particular name and arms, and endeavours to enforce this desire by rendering the estate liable to go over to some other person in default of compliance. Another usual instance is where there is a probability that an eldest son, who takes the principal interest under the settlement, may succeed also to another estate, in which case it may be desired that the estate given to the eldest son by the settlement should shift to some other person, generally to a younger brother. These are among the cases of this class occurring most frequently, but there are numerous other special events upon the happening whereof it may be desired that interests should be forfeited, such as changes of religion, succession to a peerage, marriage with a particular person, or without a particular consent, and the like. It is proposed, very shortly, to refer to some of the decisions as to the validity and effect of shifting clauses intended to effect the objects referred to (a).

Shifting  
clauses.

One of the earliest forms of the clause requiring persons to whom estates are limited in strict settlement to take the name and arms of the settlor, is to be found in Mr. Butler's

Early form  
of "name and  
arms" clause.

(a) The effect of clauses determining interests on bankruptcy and the like will be separately considered, see next Chapter.

note to Coke upon Littleton (*b*), and this clause has, indeed, formed the model of those now in use (*c*).

Mr. Butler in the same learned note also gives a warning against certain inartificial methods of endeavouring to effect the object (*d*).

"Eldest son"  
clause.

Shifting clauses of this nature are always construed very strictly, and where a property is limited to go over to another on succession by the person to whom it is originally limited to another property, it is necessary that the succession should be of precisely the nature contemplated; that is to say, as regards the second property, the person must take substantially the estate, both as to quantity and quality, contemplated by the settlor; and must succeed, in fact, to the same property by the same title as has been defined in the settlement. If this be not the case, such person may not forfeit the first property on taking the second, but may hold both. Thus, in *Meyrick v. Laws* (*e*) the testator by will declared that if

(*b*) Co. Litt. 327 a, n. ii. 2. Mr. Butler there refers, as to the doctrine particularly applicable to the clause, to the cases of *Hopkins v. Hopkins*, 1 Ves. sen. 268; 1 Atk. 501; *Doe d. Heneage v. Heneage*, 4 T. R. 13; *Carr v. Lord Erroll*, 6 East, 58; 14 Ves. 78; and *Stanley v. Stanley*, 16 Ves. 491.

(*c*) Dav. Prec. vol. 3, pt. 1, p. 368.

(*d*) Co. Litt. *ubi sup.* He says:—"The injunction of taking a particular name, and using particular arms, is sometimes improperly used; as, where lands are settled to the use of B. and the heirs of his body, he and they taking, using, and bearing, and continuing to take, use, and bear, the name and arms of A., or to the use of B. and his heirs, he and they taking, using, and bearing, and continuing to take, use, and bear, the name and arms of A. But each of these modes of injunction is very objectionable. The first is nugatory, as B., by suffering a common recovery, may acquire the fee simple

of the estate discharged from the condition. The second creates a fee simple conditional, to endure no longer than during such time as B. and his heirs comply with the condition, and therefore virtually prevents the alienation of the estate. The introduction of the word 'assigns' into the limitation does not practically remove this objection. If the lands held under the limitation last mentioned vest in the heir-at-law of the settlor the condition is determined, as there is no one to take advantage of it. The condition may be also released by such heir at law to the owner of the conditional estate. If after the condition is broken the owner of the land levies a fine with proclamations, it may be a bar after the expiration of the five years to the right of entry of the heir." *Mayor of London v. Alford*, Cro. Car. 575; 1 Jones, 452; *Cromwell's case*, 2 Rep. 69; *Thomassin v. Mackworth*, Carter, 75, n., 283.

(*e*) L. R., 9 Ch. 237.

Incorrect  
forms of  
clause.

T. C. should ever become seised of or entitled in possession to the estates settled on the marriage of St. J. C. (T. C.'s father), being in the County of Salop, then certain estates in the County of Pembroke which he had devised to the said T. C. were to go over as if T. C. were then deceased without issue male. The Shropshire estates were subsequently re-settled and charges laid upon them, and a part of considerable value withdrawn from the settlement. On the question arising, whether succession to the Shropshire estates under the re-settlement caused a forfeiture of the Pembrokeshire estates, it was considered (*f*) that the question was, whether the testator meant to provide for the event of the Shropshire estates going to T. C. or his issue male under the settlement to which he referred, and Selborne, L. C., was in this case of opinion that the same principle upon which Sir James Wigram, in *Taylor v. Earl of Harewood* (*g*), held that the mention of entailed estates was not merely a historical description of a pre-existing fact, but was intended to show the title under which the event was to take place, so here the word "settled" in the context had exactly the same force and effect, inasmuch as nothing could be more absurd and unreasonable than to suppose that the testator meant the Pembrokeshire estates to go over in the event of the acquisition at any time and by any title of the Shropshire estates by any descendant of T. C.

Shifting  
clause  
strictly  
construed.

Effect of  
taking  
under a re-  
settlement.

One of the earliest cases establishing the validity of shifting clauses of this character arose upon a proviso in a will that in case the devisee should come into possession of the principal family estate, the trustees should stand seised of the devised estates to the use of the next person in remainder. This proviso was held good, and the eldest son of the tenant for life in possession was held to be the next person in remainder (*h*).

(*f*) Per Selborne, L. C., and James and Mellish, L.JJ.  
(*g*) 3 Ha. 372.

(*h*) *Nicolls v. Sheffield*, 2 Bro. 215.



Where re-settlement confers in substance the same title.

In opposition to the principle of *Meyrick v. Laws* (i), it may be that a re-settlement is of such a character as not to be considered (for this purpose) materially to alter the title. Thus, *Harrison v. Round* (k) is an instance of a settlement which was held to be a continuation of the title, the next descendant taking substantially the same interest under the new settlement. In such a case, if the estate remains undiminished in quantity, it is held to be merely a modification of the testator's original title, and if it is diminished in value for his benefit, he is considered merely to have anticipated his interest (l).

However, in *Gardiner v. Jellicoe* (m), where it appeared that the lands, formerly part of those comprised in the Gardiner property, were only a small part thereof, and held under a new title and subject to incumbrances that could not have been imposed thereon if the plaintiff had taken under the original devise, it was held that, though he held some of the same lands he had not in substance the same amount of property, nor in title the same estate, as that to which the shifting clause referred (n).

The usual name and arms clause (o) provides for the husband of every woman becoming entitled to the estate assuming the deceased's name and arms. Where the property is given to the wife's separate use, this clause may be open to the objection that it gives to the husband indirectly by his power to occasion a forfeiture a control over his wife's property; such a clause, however, has been inserted by the court (p).

(i) L. R., 9 Ch. 237.

(k) 2 D., M. & G. 190.

(l) See also *Monypenny v. Dering*, 2 D., M. & G. 146; *Micklethwaite v. Micklethwaite*, 4 C. B., N. S. 790; *Fazakerly v. Ford*, 4 Sim. 390; 1 A. & E. 897; and *Taylor v. Harwood*, 3 Ha. 372.

(m) 12 C. B., N. S. 568.

(n) Per Sir W. Erle, C. J.

(o) Precedents of forms of shifting clauses to operate on non-assumption of particular name and

arms on accession to title or to family estates, or on becoming a nun, are given by Mr. Davidson. Dav. Prec. 3rd ed. vol. 3, pt. 2, pp. 1142—1149. A form of a name and arms clause is given by Mr. Prideaux; Prid. Conv. 7th ed. vol. 2, p. 446; and one is given in Sanders on Uses, 4th ed. Appendix, No. 1, vol. 1, p. 337.

(p) Dav. Prec. vol. 3, pt. 1, p. 353, n.; and see *Re Williams*, 6 Jur., N. S. 1064, there cited.

In a somewhat recent case, the important question, whether a peerage may be diverted and shift on the holder thereof succeeding to another peerage, has been considered, and it has been held that such a patent, on the part of the Crown, is not of valid effect, at all events when the dignity has once vested (*q*). Attempt to shift peerage invalid.

In this case a question arose whether an estate, intended to be given to the owner of the second peerage, shifted to the person who would have been entitled to the second peerage, supposing that peerage to be capable of being so shifted, notwithstanding that the dignity could not be made so to shift (*r*).

In this case, by letters patent the barony of B. was conferred on E. for life, with successive remainders to her second and other sons, and the heirs male of their respective bodies. The patent contained a proviso that if the second son of E., or any other person taking under the letters patent, should succeed to the earldom of D., the succession to the dignity of B. should devolve upon the son of E., or the heir who should be next entitled to succeed to the barony of B., if the person so succeeding to the earldom of D. was dead without issue male. *Cope v. Earl De la Warr.*

Lands were then devised by a testatrix to trustees and their heirs upon trust to convey, settle, and assure the same in a course of entail, to correspond as nearly as may be with the limitations of the barony of B. and the provisos affecting the same contained in the letters patent; and a settlement was executed, in which was inserted a clause, providing that if the second son of E. (who had then by the death of E. become Baron B.), or any other person taking under the limitations therein contained,

(*q*) *The Buckhurst Peerage*, L. R., 2 App. Ca. 1. As to the legal character and devolution of entailed honours, see the cases there cited in argument. And see *Willes' Peerage case*, L. R., 4 H. L. 126; and *The Wensleydale case*, 5 H. L. Cas. 958.

(*r*) *Cope v. Earl De la Warr*, L. R., 8 Ch. 982; 42 L. J., Ch. 870; 29 L. T. 565; 22 W. R. 8. This case was, in fact, decided before the non-validity of the shifting clause as to the dignity had been established.

should succeed to the earldom of D., the succession to the lands thereby settled should devolve upon the son of E., or the heir who would be next entitled to succeed to the barony of B., if the person so succeeding to the earldom of D. was dead without issue male. The second son of E. afterwards succeeded to the earldom of D.; he had issue male. It was held (affirming the decree of Bacon, V.-C.), upon the construction of the clause, that upon the second son of E. succeeding to the earldom of D., the third son of E. became entitled in possession to the settled estates (s), the court expressing at the same time a doubt whether the attempt to shift the barony was valid and effectual (t).

Shifting clauses void-able if against policy.

Shifting clauses may, of course, be held invalid if inconsistent with public policy—as, for instance, if in general restraint on marriage (u), or to further superstitious purposes, or any object unlawful or improper. Shifting clauses to defeat such objects, on the contrary, may be well supported; thus, a parent may validly make provision that the share of a daughter shall cease on her taking the veil (x). In forfeiture clauses care should be taken to provide, if the forfeiture take effect, for the acceleration of the remainders, so as not to leave the share of the defaulter undisposed of. The absence of such intermediate disposition may be a strong argument against the validity of the shifting clause, and under the old law as to contingent remainders—and occasionally, perhaps, still—might have caused them to be defeated by the failure too early of the particular estate (y).

(s) *Cope v. Earl De la Warr*, *ubi sup.*

(t) It was subsequently held that the attempt to shift the barony of B. was ineffectual. See *The Buckhurst Peerage*, *ubi sup.*

(u) *In re Dickenson's Trusts*, 1 Sim., N. S. 44. In this case the principle of the interference of equity in cases of this class, and

that it conforms to the civil and ecclesiastical law, is well shown.

(x) Per Lord Cranworth in *Seymour v. Vernon*, 10 Jur., N. S. 487. And see *Biddulph v. Lees*, 4 Jur., N. S. 503: on appeal, 5 Jur., N. S. 818; *In re Williams*, 6 Jur., N. S. 1064; *Morley v. Rennoldson*, 2 Ha. 570.

(y) *Seymour v. Vernon*, *ubi sup.*

## CHAPTER XXI.

## DETERMINABLE INTERESTS.

THREE things are specially to be considered in regard to interests purporting to be determined on a given event, such as insolvency, attempt to alienate, or the like; firstly, whether there is a complete gift over of the interest so purporting to be determined, so that there is nothing reserved in favour of the person whose interest is intended to be forfeited (otherwise the gift over may be colourable only); secondly, whether the exact event, on which the determination of interest is to take place, has occurred, the provisions in this respect being strictly construed; and thirdly, whether the proviso for the cessation of the interest may not be void for repugnancy.

Forfeiture  
clauses void  
in three cases.

Money belonging to the wife, or in fact derived from any other quarter than from the husband, may be settled upon the husband so as to go over upon his insolvency, or upon his alienating or attempting to alienate it. This was so decided long ago by Lord Eldon (*a*), on the authority of a still earlier case (*b*), said to have been followed by Lord Thurlow, in which the distinction in favour of money, which formed part of the wife's property and not the bankrupt's, was clearly laid down.

Care, however, in these cases, must be taken that the rather narrow distinction is observed between a gift to one until a certain event, with a gift over thereupon, and a gift to one absolutely, or for his life, or any other term, with a simple clause of forfeiture if he attempt to deal with his interest in a particular manner, as in the latter case the

Gift until a  
certain event  
good.

(*a*) *Ex parte Hinton*, 14 Ves. 398. (*b*) *Lockyer v. Savage*, 2 Strange, 947.

clause may be void for repugnancy. In *Brandon v. Robinson* (c), Lord Eldon says: "There is no doubt that property may be given to a man until he shall become bankrupt. It is equally clear, generally speaking, that if property is given to a man for his life, the donor cannot take away the incidents to a life estate, and, as I have observed, a disposition to a man till he shall become bankrupt, and after his bankruptcy over, is quite different from an attempt to give to him for his life with a proviso that he shall not sell or alien it. If that condition is so expressed as to amount to a limitation reducing the interest short of a life estate, neither the man nor his assignees can have it beyond the period limited. In the case of *Foley v. Burnell* (d), this question afforded much argument. A great variety of clauses and means was adopted by Lord Foley, with the view of depriving the creditors of his son of any resort to their property, but it was argued here, and, as I thought, admitted that if the property was given to the son it must remain subject to the incidents of property, and it could not be preserved from the creditors unless given to some one else" (e).

*Foley v.  
Burnell.*

A man cannot  
be restrained  
from antici-  
pation.

The income of funds cannot be limited for the personal benefit of a man, so that he cannot deprive himself thereof by anticipation; this peculiar protection can only be conferred on a married woman, in whose case, as the court solely enables, so it can also limit the power of disposition (f).

So an annuity given by will to a son for his personal support, not to be liable to his debts, and to be paid from time to time into his proper hands, and not to any other person, and his receipt alone to be a proper discharge, went on his bankruptcy to a purchaser from his assignees (g);

(c) 18 Ves. 483; and see *Graves v. Dolphin*, 1 Sim. 66.

(d) 1 Bro. C. C. 274.

(e) And see *Younghusband v. Gisborne*, 1 Coll. 401. But see *Rochford v. Hockman*, 9 Ha. 475; *Dommett v. Bedford*, 6 T. R. 684; and *Joel v. Mills*, 3 K. & J. 458,

from which cases it seems that a simple provision for cesser of the life interest may be held to be sufficient.

(f) *Brandon v. Robinson*, 18 Ves. 435.

(g) *Graves v. Dolphin*, 1 Sim. 66.

and in this case, the Vice-Chancellor (*h*) remarked that the testator might, if he had thought fit, have made the annuity determinable by the bankruptcy of his son; but the policy of the law did not permit property to be so limited that it should continue in the enjoyment of the bankrupt, notwithstanding his bankruptcy.

As a general rule, in the case of a gift of an annuity, or of a sum of money to buy an annuity, to a person who is *sui juris*, such person may elect at once to take the value of the annuity absolutely (*i*); and this is so, even in the case of a gift of an annuity to a woman for her separate use, she being unmarried at the time when the annuity becomes payable (*k*). And a simple direction that the annuity is not to be dealt with or alienated will not be effective (*l*). If, however, there be a gift over of the annuity upon alienation, either in favour of named objects or even by a simple direction, that the annuity (if given by will) is to sink into the residuary estate of the testator (*m*), then the annuity cannot be anticipated by the annuitant (*n*).

Legatee may elect to take value of annuity.

So, also, where A. assigned 800*l.* to trustees in trust during the life of B., or such part thereof as they should think proper, or at such other times and in such portions as they should judge expedient to pay the interest to him, or, if they should think fit, to lay it out in procuring for him diet and other necessaries, but so that he should not have any right to the interest other than the trustees in their uncontrolled discretion should think proper, and so as no creditor of his should have any claim thereon, nor should the same be subject to his debts and dispositions

*Snowdon v. Dales.*

(*h*) Sir J. Leach.

(*i*) *Barnes v. Rowley*, 3 Ves. 305; *Bayley v. Bishop*, 9 Ves. 6.

(*k*) *Woodmeston v. Walker*, 2 Russ. & My. 197.

(*l*) *Ibid.*, and see *Foulston v. Furber*, 24 W. R. 756.

(*m*) *Lloyd v. Branton*, 3 Mer. 108.

(*n*) *Hatton v. May*, L. R., 3

C. D. 148; 24 W. R. 754; *Roper v. Roper*, L. R., 3 C. D. 714; 35 L. T. 155; 24 W. R. 1013; *Power v. Hayne*, L. R., 8 Eq. 262; 17 W. R. 783; *Allen v. Jackson*, L. R., 1 C. D. 399; 45 L. J., Ch. 310; 33 L. T. 713; 24 W. R. 306. But see *Day v. Day*, 1 Drew. 569; 22 L. J., Ch. 878.

and it was declared that after his death the 800*l.* and all savings and accumulations (if any) should be for his children, and if he should have no child, in trust for C.; it was held, upon B. becoming bankrupt (the trustees having paid him the interest down to the bankruptcy), that his life interest passed to the assignees (o).

Discretion of trustees to pay income.

The best mode of attempting to make an inalienable provision for a man thought not to be capable of taking care of his pecuniary affairs, or one engaged in a business of great risk, is to give to a number of trustees absolute discretionary powers of paying the income of property to him or to named other persons. In these cases, questions frequently arise as to the amount (if any) of the interest which passes to the trustee in case of the bankruptcy of such person. The cases on this subject are numerous, and not always, it is to be admitted, easily reconcilable, and some of them are subjoined (p).

Repugnancy.

As regards repugnancy, the general rule is, that a condition inconsistent with a gift is void; therefore, under a bequest to one for life, and at his decease to his executors, with a gift over if he attempts to dispose of the principal or the like, the legatee takes an absolute interest, and the condition being inconsistent with it is void.

*Bradley v. Peizoto.*

In *Bradley v. Peizoto* (q), a testator made the following disposition: "I give and bequeath to my son the dividends arising from 1,620*l.* of my bank stock for his support during the term of his life, but at his decease the same to devolve to his heirs, executors, administrators and assigns. Having observed during the term of my life so many fatal examples of parents having left their children in a state of

(o) *Snowdon v. Dales*, 6 Sim. 534. The court not considering in that case that there was any express gift over of the savings and accumulations. *Sed quere*, and see *Piercy v. Roberts*, 1 My. & K. 4; *Arden v. Goodacre*, 11 C. B. 883.

(p) See on the subject *Twopenny v. Peyton*, 10 Sim. 487; *Godden v. Crowhurst*, *ibid.* 642; *Coe's Trusts*,

4 K. & J. 199; *Snowdon v. Dales*, 6 Sim. 524; *Piercy v. Roberts*, 1 M. & K. 4; *Page v. Way*, 3 Beav. 20; *Wallace v. Anderson*, 16 Beav. 533; *Kearsley v. Woodcock*, 3 Ha. 185; *Lord v. Bunn*, 2 Y. & C. C. 98; *Holmes v. Penny*, 3 K. & J. 90. (q) 3 Ves. 324. And see *Peizoto v. Bank of England*, cited *ibid.* p. 326.

opulence, who have afterwards been reduced to want the common necessities of life, my principal view in this will is, that my wife and children may have solid sufficiency to support them during their lives. For this purpose I will and most strictly ordain that if my wife or any one of my children shall attempt to dispose of any part of the bank stock, the dividends from which is bequeathed to them in this will for their support during their lives, such an attempt by my wife or any of my children shall exclude them, him or her so attempting from any benefit in this will, and shall forfeit the whole of their share, principal and interest, which shall go and be divided unto and among my other children in equal shares that will observe the tenor of this will and testament." In this case, it was held that the son took an absolute interest not liable to be defeated.

So, as to realty, a condition that a tenant in fee shall not alienate (*r*), or that a tenant in tail shall not suffer a recovery, is void (*s*).

According to the old books (*t*) the test is, whether the condition takes away the whole power of alienation substantially; and the question is one of substance and not of mere form.

Alienation may be restricted in many ways. One may restrict alienation by prohibiting a particular class of alienation, or by prohibiting it to a particular class of individuals, or by restricting it to a particular time. In all these ways alienation may be limited. How far restraint on alienation allowed.

In a case (*u*) where there was a devise of a property to J. on condition that he never sold it out of the family, the Master of the Rolls held the restriction not to be too general, and that it was limited in two ways at all events. *In re Macleay.*

(*r*) *Bradley v. Peizoto*, 3 Ves. 325.

(*s*) *Piers v. Winn*, 1 Vent. 321; Co. Litt. 223 a; *Mildmay's case*, 6 Co. 40; *Stukeley v. Butler*, Hob. 168.

(*t*) Co. Litt. 222 a, 223 a, 223 b; and *S. C.*, Sheppard's Touchstone.

(*u*) *In re Macleay*, L. R., 20 Eq. 186; 44 L. J., Ch. 441; 32 L. T. 682; 23 W. R. 718.



First, it was limited as to the mode of alienation, because the only prohibition was against selling, there being various modes of alienation besides sale, inasmuch as a person may lease, or may mortgage, or may settle; secondly, it was limited as regards class, as he was never to sell it out of the family; but he might sell it to any one member of the family. It was not, therefore, limited in the sense of there being only one person to buy. The will showed that there were a great many members of the family when the testatrix made it, and there was, therefore, a class which was certainly not small. Then it was not, strictly speaking, limited except that it was limited to the life of the first tenant in tail. Of course, if unlimited in time it would have been void for remoteness under another rule. The restraint on alienation was strictly a limited one, and unless Coke upon Littleton was not good law the condition was good (x).

(x) Per Sir G. Jessel, M. R., in *In re Macleay*, *ubi sup.*

## CHAPTER XXII.

### HOTCHPOT, SATISFACTION, AND ADEMPMENT.

It is often desired to give the trustees of a marriage settlement power to raise and advance a part of the settled funds to a child in respect of his presumptive or vested share, for the purpose of his or her advancement in life. The amount allowed is generally one half, and during the existence of life tenancies it is generally to be made only with the consent of the life owners. This clause must still be expressly inserted where the object of it is desired. It has not been supplied by legislation, as have the maintenance and accumulation clauses heretofore usually inserted with it (a).

Advancement  
clause.

The usual "hotchpot" clause is also still required to be inserted where (as is almost universally the case) its object is desired, though it might have seemed that the legislature might as well (while about it) have gone on to enact that its effect should be deemed to be read into every settlement in the absence of expression to the contrary (b).

Hotchpot not  
assumed.

Notwithstanding the preference shown by the court for equality of portions, yet if part of a fund, subject to a power of appointment, remain unappointed, an object of the power will have his equal share of the residue thereof, notwithstanding that he has had part appointed to him; and it is the rule that it will not be assumed that a person to whom a specific share is appointed is to be excluded from taking any of the unappointed residue on such

(a) 44 & 45 Vict. c. 41, s. 43.

(b) Under the Statute of Distributions, children on intestacy have to bring advancement into

hotchpot; and the same is the case under the customs of London and York.

ground, for instance, as that the father intended that he should have no more than what was particularly given (c).

We have high authority for saying that this rule generally disappoints the intention of the parties; but the canons of decision must be followed, though defeating the intention, and the rule, if wrong, can only be set aside by the House of Lords (d) or by legislation.

Thus, where there was a fund of 6,000*l.*, subject to appointment among younger children, and the donee of the power made a somewhat informal but effectual appointment in the following terms: "Robbert give 3 of the 6,000*l.* I wish to have given to the two elder girrels:" it was held, that the two elder girls, in addition to the sum so informally appointed to them, took also an equal share with the other children in the part left unappointed (e).

Hardship of rule.

The hardship occasioned by the rule is often considerable, yet the courts have not appeared to seize hold readily of opportunities of taking cases out of the general rule. Thus, the fact that the amount appointed is such as to leave each of the other children a sum (if divided between them alone) equal to that of the appointee, is not sufficient (f).

Where hotchpot implied.

Though the general rule is what has been stated, yet there is an exception where an appointment to one of the objects amounts by inference to an appointment of the residue to the other objects, so that in fact the whole is appointed. Thus, a power of appointment among three persons was considered to be exercised as to all by a transfer of one-third to one under an order on petition, stating that the donee of the power was desirous that the fund might be equally divided; and on his dying, without any further execution of the power, the court gave the other two-third parts respectively to the other two persons or their representatives (g).

(c) Per Lord Hardwicke in *Bris-  
tow v. Ward*, 2 Ves. 350.

(d) Per Cranworth, L. C., in  
*Walmsley v. Vaughan*, 1 De G. & J.  
126.

(e) *Alloway v. Alloway*, 4 Dr. &  
War. 380.

(f) *Foster v. Cautley*, 6 De G.,  
M. & G. 55.

(g) *Fortescue v. Gregor*, 5 Ves. 553.

The insertion in the appointment of a clause, which would be unnecessary unless that appointment is to be considered as appointing by implication the other shares to the other objects, may be sufficient to exclude the rule (*h*).

An appointment, however, to one of a class of a moiety of a fund "as her part, share and proportion," did not prevent her participating in the non-appointed moiety limited to the class generally in default of appointments; something more, it seems, is wanted to imply that the remainder is the part, share and proportion of the others or other (*i*).

Where there is a power of appointment among children and no appointment is made, and there is an express gift to the children in default of appointment, yet there may be by implication from the terms of the power a gift to the children, the object of the power, as in default of appointment (*k*).

Gift by implication.

Under a non-exclusive power of appointment among all children, part was well appointed to some leaving a share not illusory for the others, which was afterwards appointed, so as to exclude some of the objects. In this case only the second appointment was held bad (*l*).

The leaning against double portions, above referred to, has given rise to the equitable doctrines of Ademption and Satisfaction; that is to say, where two provisions are made for children by separate instruments, one may be held to be replaced by or in satisfaction of the other.

In determining in any particular case, whether a gift by a parent or a person *in loco parentis* is intended to be in addition to or in substitution for a prior gift by the same person, it must always be borne in mind that there is a presumption, or, as Lord Eldon has expressed it (*m*), a sort of feeling upon what is called a leaning against double

Presumption in favour of satisfaction.

(*h*) *Foster v. Cautley*, 6 De G., M. & G. 67.

(*i*) *Wombwell v. Hanrott*, 14 Beav. 143, 151, *sed quære*.

(*k*) *Alloway v. Alloway*, 4 Dr. & War. 380, 391.

(*l*) *Wilson v. Piggott*, 2 Ves. 355.

But questions as to exclusive and non-exclusive powers and illusory appointments are now of little or no importance. As to powers exercised since July, 1874, see 37 & 38 Vict. c. 37.

(*m*) *Ex parte Pye*, 18 Ves. 140.

portions. This presumption may be repelled, or be fortified by intrinsic evidence derived from the nature of the two provisions. Where the two provisions are of the same nature, or there are but slight differences, the two instruments afford intrinsic evidence against a double provision. Where the two provisions are of a different nature the two instruments afford intrinsic evidence in favour of a double provision (n); and previous decisions afford but a slight assistance in these cases, for it is not possible to define what are to be considered as slight differences between two provisions. Slight differences are such as, in the opinion of the judge, leave the two provisions substantially of the same nature, and every judge must decide that question for himself (o).

Slight difference between two provisions not material.

Distinction between ademption and satisfaction.

Satisfaction is to be presumed.

The distinction between ademption and satisfaction lies in this: in ademption, the former benefit is given by will, which is a revocable instrument, and which the testator can alter as he pleases, and consequently, when he gives benefits by a deed subsequently to the will, he may, either by express words or by implication of law, substitute a second gift for the former, which he has the power of altering at his pleasure. Consequently, in this case, the law uses the word ademption, because the bequest or devise contained in the will is thereby adeemed, that is, taken out of the will. But when a father, on the marriage of a child, enters into a covenant to settle either land or money, he is unable to adeem or alter that covenant, and if he gives benefits by his will to the same objects, and states that this is to be in satisfaction of the covenant, he necessarily gives the objects of the covenant the right to elect whether they will take under the covenant or whether they will take under the will. Therefore the distinction is manifest. In cases of satisfaction, the persons intended to be benefited by the covenant—who, for shortness, may be called the objects of the covenant—and the persons intended to be benefited by

(n) *Weale v. Rice*, 2 Russ. & My. 267. (o) Per Sir John Leach, *ibid.*

the bequest or devise—in other words, the objects of the bequest—must be the same. In cases of ademption they may be, and frequently are, different (*p*).

Where there has been a transfer to a child to whom a legacy has been given of a sum greater or less (if greater, so as to operate as a total extinction; if less, so as to operate as a partial extinction), or even of a corresponding amount, many cases may, indeed, be cited to show that it is not enough that the transfer has taken place, or the transfer been made, but that there must also be something beyond that, and that there must be something further in the circumstances to raise a presumption, which would not otherwise exist, in favour of the satisfaction of the one gift by the other. This, however, it seems, is not now a correct statement of the law, and for the purpose of raising the presumption it is not, as a rule, incumbent upon the person who alleges a satisfaction (*q*) to show anything more than that the testator, having given a legacy of a certain amount, afterwards in his lifetime gave the legatee a sum of money—the nature of the two gifts not being so different as to rebut the presumption (*r*).

In an old case it is decided that when a parent, or person *in loco parentis*, gives a legacy as a portion, and afterwards, upon marriage or any other occasion calling for it, makes advances in the nature of a portion to that child, that will amount to an ademption of the gift by the will; and the court will presume he meant to satisfy the one by the other. It differs from the performance or satisfaction of a covenant in this, that the court overlooks small differences in the circumstances of that which is proposed to be given, and that in satisfaction of which it is intended to be given. The court does not inquire whether the portion by the will

(*p*) Per Lord Romilly in *Lord Chichester v. Coventry*, L. R., 2 H. L. 71, 90; 17 L. T. 355; 16 W. R. (Dig.) 24.

(*q*) Or rather an ademption. The two terms, satisfaction and ademption, though properly distinguish-

able (as above), are often used indiscriminately.

(*r*) Per Hall, V.-C., in *Leighton v. Leighton*, L. R., 18 Eq. 458, 468; 43 L. J., Ch. 594; 22 W. R. 727.

is given absolutely and entirely to the child; and a settlement on marriage, though it would not be a performance of a covenant or satisfaction of a debt, yet may be presumed to be a satisfaction of the intended portion (s).

*Thynne v. Earl of Glengall.*

In *Thynne v. Earl of Glengall* (t) a testator, on the marriage of one of his two daughters and only children, had partly paid and partly secured 100,000*l.* upon trust for the daughter's separate use for life, and after her death for the children of the marriage, as the husband and she should jointly appoint. He afterwards gave, by his will, a moiety of the residue of his personal estate, in trust for the daughter's separate use for life, with remainder for her children generally as she should appoint by deed or will. It was held by the House of Lords in that case, that the moiety of the residue given by the will was a satisfaction of the bond debt notwithstanding the difference of the trusts; and that the daughter and her children (if any) were put to their election whether they would take under the will or insist upon satisfaction of the bond debt; and it being found that it would be for the benefit of the daughter and her children that she should take under the will, it was decreed that she was bound so to take.

Election.

The differences in that case were that by the settlement the appointment among the children was to be joint by the husband and wife, and under the will by the wife alone; and that under the settlement the children of the marriage were the only objects of the appointment, and under the will the children of the daughter generally; those differences were held, according to the rule applicable to double portions, not to be sufficient to negative the presumption of satisfaction.

In the case of *Chichester v. Coventry* (u), a direction in the

(s) *Trimmer v. Bayne*, 7 Ves. 508, 515.

(t) 2 H. L. C. 131.

(u) L. R., 2 H. L. 71; 17 L. T. 355; 16 W. R. (Dig.) 24. And

see *Bennett v. Houldsworth*, L. R., 6 C. D. 671; 46 L. J., Ch. 646; 36 L. T. 648, where the decision in *Chichester v. Coventry* is expressly followed and approved.

will to pay debts was held to rebut the presumption that a gift in the will was a satisfaction of a covenant in a previous settlement, and this case was followed, though not solely on that ground, by the Vice-Chancellor Hall in a later case (*x*).

(*x*) *Smythe v. Johnston*, W. N. 1876, p. 18; 31 L. T., N. S. 876.  
And see *Curtis v. Mackenzie*, W. N. 1877, p. 213.



## CHAPTER XXIII.

## IMPEACHMENT FOR WASTE.

Who is liable  
for waste. THE persons liable for waste, and the circumstances under which they become liable, are laid down in Coke upon Littleton (a). According to this authority an action of waste lies against tenant by the curtesie, tenant in dower, tenant for life, for years, or half a year, or guardian in chivalry, by him that hath the immediate estate of inheritance for waste or destruction in houses, gardens, woods, trees, or in lands, meadows, &c., or in exile of men to the disherison of him in the reversion or remainder. There be two kinds of waste, viz., voluntary, or actual, and permissive.

What is  
waste. Waste may be done in houses by pulling or prostrating them down, or by suffering the same to be uncovered, whereby the spars or rafters, plaunchers, or other timber of the house, are rotten. But if the house be uncovered when the tenant cometh in, it is no waste in the tenant to suffer the same to fall down. But though the house be ruinous at the tenant's coming in, yet if he pull it down it is waste unless he re-edify it again. Also if glass windows (though glazed by the tenant himself) be broken down or carried away, it is waste, for the glass is part of his house. And so it is of wainscot, benches, doors, windows, furnaces and the like, annexed or fixed to the house either by him in the reversion or the tenant.

Though there be no timber growing upon the ground, yet the tenant at his peril must keep the houses from wasting. If the tenant does or suffer waste to be done in houses, yet if he repair them before any action, brought

(a) Co. Litt. 53 a *et seq.*

there lieth no action of waste against him, but he cannot plead *quod non fecit vastum*, but the special matter.

A wall uncovered when the tenant cometh in is no waste if it be suffered to decay. If the tenant cut down or destroy any fruit trees growing in the garden or orchard it is waste (*b*); but if such trees grow upon any of the ground which the tenant holdeth out of the garden or orchard it is no waste.

If the tenant build a new house it is waste, and if he suffer it to be wasted it is a new waste. If the house fall down by tempest, or be burnt by lightning, or prostrated by enemies, or the like, without a default of the tenant, or was ruinous at his coming in and fall down, the tenant may build the same again with such materials as remains, and with other timber which he may take growing on the ground for his habitation, but he must not make the house larger than it was. If the house be discovered by tempest the tenant must in convenient time repair it.

Building and  
repairing  
house.

If the tenant of a dove-house, warren, park, vivary, estanges, or the like, do take so many as such sufficient store be not left as he found when he came in, this is waste, and to suffer the pale to decay, whereby the deer is dispersed, is waste.

And it is to be observed that there is waste, destruction and exile. Waste properly is in houses, gardens (as is aforesaid), in timber trees (viz., oak, ash and elm, and these be timber trees in all places), either by cutting of them down or topping of them, or doing any act whereby the timber may decay (*c*). Also, in countries where timber is scant, and beeches, or the like, are converted to building for the habitation of man, or the like, they are all accounted timber. If the tenant cut down timber trees, or such as are accounted timber (as is aforesaid), this is waste, and if

Cutting  
timber.

(*b*) As to forfeiture by committing waste in non-cultivation of an orchard, see *Doe d. Jones v. Cornill*, 2 Camp. 449.

(*c*) But tenant for life may cut

down trees which are not timber, and do not come within the doctrine of equitable waste (see *infra*) as being an ornament or shelter; *Phillips v. Smith*, 14 M. & W. 589.

he suffer the young germins to be destroyed this is destruction. So it is if the tenant cut down underwood (as he may by law), yet if he suffer the young germins to be destroyed, or if he stub up the same, this is destruction.

Cutting down of willow, beech, birch, aspe, maple, or the like, standing in the defence and safeguard of the house, is destruction (*d*). If there be a quickset fence of white thorn, if the tenant stub it up or suffer it to be destroyed, this is destruction, and for all these and the like destructions an action of waste lieth. The cutting of dead wood, that is, *ubi arbores sunt aridæ mortuæ cavæ, non existentes maremium, nec portantes fructus nec folia in æstate*, is no waste: but turning of trees to coals for fuel, when there is sufficient dead wood, is waste.

Opening  
mines.

If the tenant suffer the houses to be wasted, and then fell down timber to repair the same, this is a double waste. Digging for gravel, lime, clay, brick earth, stone, or the like, or for mines of metal, coal, or the like, hidden in the earth, and were not open when the tenant came in, is waste, but the tenant may dig for gravel or clay for the reparation of the house as well as he may take convenient timber trees (*e*).

It is waste to suffer a wall of the sea to be in decay, so as by the flowing and reflowing of the sea the meadow or marsh is surrounded, whereby the same becomes unprofitable; but if it be surrounded suddenly by the rage or violence of the sea, occasioned by wind, tempest, or the like, without any default in the tenant, this is no waste punishable. So it is if the tenant repair not the banks or walls against rivers or other waters whereby the meadows or marshes be surrounded, and become rushy and unprofitable.

Changing  
course of  
husbandry.

If the tenant convert arable land into wood, or *e converso*, or meadow into arable (*f*), it is waste, for it changeth not

(*d*) See below, as to equitable waste not being permitted to be made by tenant without impeach-

ment of waste.

(*e*) See *infra*, p. 163.

(*f*) It seems doubtful whether

only the course of his husbandry, but the proof of his evidence.

The tenant may take sufficient wood to repair the walls, pales, fences, hedges and ditches as he found them : but he can make no new, and he may take also sufficient plowbote, firebote, and other housebote (*g*).

The tenant cutteth down trees for reparations and selleth them, and after buyeth them again, and employs them about necessary reparations, yet it is waste by the vendition : he cannot sell trees, and with the money cover the house : burning of the house by negligence or mischance is waste (*h*).

It is also waste to destroy a building, even if it be replaced by a better of a different kind (*i*). Alteration of the character of a property so as to render difficult proof of the identity is itself waste, independently of value (*k*).

Estates for life are not unfrequently expressly limited to be without impeachment of waste. Where this is so, the tenant for life is enabled to cut down timber, and open new mines, and work them for his own benefit (*l*), and the like, but the power does not extend to enable the tenant for life to cut down ornamental timber and the like (*m*).

The words "without impeachment of waste" are a translation from the Latin form "*absque impetitione vasti*" (a form used in the Statute of Marlbridge (*n*)), and by

*Estates*  
"without im-  
peachment of  
waste."

ploughing up old meadow land would be waste, if it could be proved that it were done for the purpose of resowing and laying it down in grass again ; *Simmons v. Norton*, 7 Bing. 640. See also *Dyer*, 37 ; *Hob.* 234 ; *Roll. Abr.* 814 ; *Doe d. Foley v. Wilson*, 11 East, 56. The act of God does not create waste ; *Simmons v. Norton*, *ubi sup.* p. 648. But converting arable land into an orchard, is said to be waste, even though it be for improvement ; *Com. Dig.* "Waste," D. 4.

(*g*) See *Simmons v. Norton*, 7 Bing. 640 ; though tenant for life

may cut down trees for repairs, yet it seems if he cut unsuitable trees and exchange them for those suitable, and repair with them, it is waste ; *ibid.*

(*h*) *Co. Litt. ubi sup.*

(*i*) *Cole v. Green*, 1 Lev. 309, where a building worth 120*l.* was replaced by one worth 200*l.*

(*k*) *Simmons v. Norton*, 7 Bing. 647.

(*l*) *Co. Litt.* 220 a, note 1.

(*m*) This is called equitable waste, as to which see *infra*, p. 170.

(*n*) Otherwise *Marlborough*, 52 Hen. 3.

force thereof, the tenant may commit waste by cutting timber, and the like, and convert the proceeds to his own use (o). It appears, however, to have been otherwise, if the words were "without being impeached of waste," for in that case the discharge extended but to the action, and not to the property in the trees, and consequently the reversioner should have them.

Proceeds be-  
long to life  
tenant.

Originally even the words "without impeachment of waste" did not give the tenant for life or years any property in timber cut. They were thought ineffectual for that purpose, but relieved him only from forfeiture and damages, to which he would otherwise have been liable under the Statute of Gloucester (p). This doctrine, however, was overruled by somewhat later cases, and it is now settled that the proceeds of waste committed under the protection of these words belongs to the tenant for his own benefit (q).

Standing timber is of course real property, and a contract to sell timber trees by a tenant for life entitled to cut timber will not, it seems, create an equitable conversion of the timber from realty into personalty, for trees, it is said, cannot be felled by a goose quill (r); but it is otherwise, it seems, if the contract be made by an owner in fee (s).

When the guardian of an infant in tail cuts down timber it is the personal estate of the infant, but if the infant has the fee simple, it is to be considered as real estate (t). When timber on the estate of a lunatic was cut under an order of court and sold, and the produce paid into the Bank of England, it was held, on the death of the lunatic, to be personalty (u).

(o) Co. Litt. 220 a. In early times timber was the almost exclusive subject of waste, and a right to cut timber was often treated as co-extensive with the right to commit waste generally; now of course the right as to minerals is of equal or greater importance.

(p) 6 Ed. 1, c. 5; Craig on Trees, p. 24.

(q) Craig on Trees, *ibid.*; Lewis

Bowles's case, 11 Co. 79 b, where the difference of meaning between the terms "without being impeached," and "without being impeached for waste," is explained.

(r) 11 Co. 50 a.

(s) *Turner v. Wright*, 2 D., F. & J. 234.

(t) *Tullit v. Tullit*, Ambl. 370.

(u) *Ex parte Bromfield*, 1 Ves. jun. 453. And see *Inwood v. Twyne*,

With regard to the generally received distinction between cases, where the conversion of real estate of an infant or other person under disability is authorized, and where it is tortious, the particular facts in each case must be considered. On this point it has been laid down, and is still the law, that guardians and trustees may change the nature of infants' estates under particular circumstances, and that the court will support their conduct if the court could have done the same under similar circumstances, but that they should not do it wantonly, but only where it is manifestly for the convenience of the infants; and that, though the court keeps a strict hand over them to prevent partiality, it is too hard to say that the court would not permit trustees or guardians to do it in a proper case. The court has done it in many cases in making compositions, and often contrary to the direction of the donor or testator, as where money is directed to be laid out in freehold land, the court has for convenience ordered part to be laid out in leasehold. The court has no more right to change the nature of the infant's estate than trustees or guardians have (x).

What is a conversion of real estate.

Court no power to convert.

In the absence of a power in that behalf a tenant for life may not open new mines, although mines are expressly mentioned in the general words creating the trust; he may, however, work mines already opened and enjoy the produce thereof as income. When there is a power in a settlement to let mines the produce is made part of the annual profits of the estate, whether it is in royalties or in whatever shape, and it need not be treated as in the

*Ambl.* 407; *Tullit v. Tullit*, *ubi sup.*; *Anandale v. Anandale*, 2 *Ves.* 381; *Winchelsea v. Norcliffe*, 1 *Vern.* 435; *Ex parte Ludlow*, 2 *Atk.* 407; *Sergeson v. Sealey*, *ibid.* 412; *Hearle v. Greenbank*, 1 *Ves.* 298; *Ex parte Grimston*, *Amb.* 706; *Ozenden v. Lord Compton*, 2 *Ves. jun.* 69; *Toker v. Annesley*, 5 *Sim.* 241.

(x) Per Lord Northampton, L.C., in *Inwood v. Twyne*, *Ambl.* 419,

following *Winchelsea v. Norcliffe*, 1 *Vern.* 435, a case decided with considerable solemnity before the then Lord Chancellor and Master of the Rolls, Chief Baron Atkins, and Mr. Justice Lutwyche. See *Ex parte Bromfield*, 1 *Ves. jun.* 455. But as to the power of the court to sell real property of infants, see now Rules of Court, 1883, Ord. LI. sect. 1.

case of timber cut where the produce is invested and interest only given to the tenant for life (y).

Mines and  
quarries.

If a mine or quarry has been worked for commercial profit, that must ordinarily be decisive of the right to continue working; and, on the other hand, if minerals have been worked or used for some definite and restricted purpose only (*e. g.*, for fuel, or for repair of some particular tenements), that would not alone give any such right (z). But if there has been a working and use of minerals not limited to any special or restricted purpose, there is nothing in the older authorities to justify the introduction of sale, as a necessary criterion of the difference between a mine or quarry which is, and one which is not, to be considered open in a legal sense. Use as well as sale is a preception of profit. None of the *dicta* to be found in some of the more modern cases (each of which turned upon its own particular circumstances) can have been intended to introduce a condition or qualification not previously known in the law of mines (a).

Mines already  
opened.

When a mine or quarry is once open so that the owner of an estate impeachable for waste may work it, the sinking a new pit on the same vein, or breaking ground in a new place on the same rock, is not necessarily the opening of a new mine or a new quarry, and for this authority is to be found in decisions (b).

It has been held that the produce of the sale of underwood and of timber cut periodically in the regular course of thinning is to be treated as income, but that of timber not cut in the regular course, but to improve the growth of the

(y) *Daly v. Beckett*, 24 Beav. 114, 121. See, also, as to mining leases by tenants for life, *Jegon v. Vivian*, L. R., 6 Ch. 742; 40 L. J., Ch. 719; 19 W. R. 365; *Ashton v. Stock*, L. R., 6 C. D. 521; 25 W. R. 862; *Elias v. Griffith*, L. R., 8 C. D. 521.

(z) Per Selborne, L. C., in *Elias v. Snowdon Slate Quarries Co.*, L. R., 4 App. Ca. 465; 48 L. J., Ch.

811; 41 L. T. 289; 28 W. R. 54.

(a) Selborne, L. C., *ibid.*

(b) *Ibid.* See *Clavering v. Clavering*, 2 P. W. 388; *Bagot v. Bagot*, 32 Beav. 509; *Earl Cowley v. Wellesley*, 35 Beav. 636; L. R., 1 Eq. 656; 14 W. R. 528; 14 L. T. 245. And see also *Spencer v. Scurr*, 31 Beav. 334; and *Millett v. Davey*, 31 Beav. 470.

remaining trees, as capital (*c*). The produce of the sale of gravel on the waste lands, and the fines payable on grants of waste land made by trustees, and moneys payable in consideration of the waiver by trustees of restrictive conditions in grants made by them (but not where the grants have been made by the testator), and preliminary fines paid to the trustees as lords of the manor pursuant to the Copyhold Act, 1852, were respectively treated as income (*d*).

It has also been held that the expense of fencing waste lands, granted to a trustee for the benefit of the estate, must be paid out of capital, while the costs of rendering accounts for succession duty must be paid out of income (*e*).

Expenses of estate payable from corpus.

In the case of waste committed by a tenant for life in cutting timber, the produce of sale is a part of the inheritance; and as the tenant for life cannot gain advantage by his own wrongful act, the produce is invested and accumulated for the benefit of the person entitled to the next estate of inheritance (*f*). In the case of timber blown down by a storm there is no waste, because it is the act of God, and though the produce of sale should be invested for the benefit of the inheritance, yet the interest need not be accumulated, but may be paid to the tenant for life in whose time the event occurs (*g*).

A tenant for life, however, is entitled absolutely to the benefit of the sale of all such trees felled by the wind as he would be entitled to cut himself, and to all proper thinnings, and to all coppices cut periodically in the nature of crops (*h*).

Trees blown down.

The right to timber cut by a tenant for life, under such circumstances that he has no right to it himself, belongs to those who at the time of its being severed are seised of the

(*c*) *Earl Cowley v. Wellesley*, *ubi sup.*; *Bagot v. Bagot*, 32 Beav. 518; *Phillips v. Smith*, 14 M. & W. 589.

(*d*) *Earl Cowley v. Wellesley*, *ubi sup.*

(*e*) *Ibid.* And see *Dent v. Dent*, 30 Beav. 363.

(*f*) *Bateman v. Hotchkin* (No. 2), 31 Beav. 486.

(*g*) *Ibid.* But see *Lewis Bowles's case*, 11 Co. Rep. 88; *Whitfield v. Bewit*, 2 P. W. 240; *Lushington v. Boldero*, 15 Beav. 1.

(*h*) *Bateman v. Hotchkin*, *ubi sup.*



first estate of inheritance, and the property becomes vested in them (*i*). Thus, in a case where great quantities of timber were blown down at Welbeck, the seat of the Duke of Manchester (*k*), though there were several tenants for life with remainders to themselves in tail, yet, there being no sons born, the timber was decreed to belong to the first remainderman in tail (*l*).

When proceeds accumulated.

Yet where the tenant for life has also in himself the next existent estate of inheritance, subject to intermediate life estates, he shall not take advantage of his own wrong in cutting down timber, but the court will preserve it for the benefit of the contingent remaindermen (*m*).

Express mention of mines in the gift does not enable the tenant for life to open mines not already open any more than the mention of timber in a conveyance enables him to cut it down; but the tenant for life, subject to waste, shall no more open a mine than he shall cut down timber trees; but the meaning of inserting mines and trees in a conveyance on successive trusts is that all should pass, but that as the timber and mines are part of the inheritance, no one should have power over them but such as had an estate of inheritance limited to him (*n*).

Tort-feasor cannot profit by his wrong.

The rule that a tenant for life who has committed waste shall be precluded from sharing in the income of any proceeds thereby arising, derives its origin from the principle that no man can take advantage of his own wrong, and it might have been thought that a succeeding innocent tenant for life might have had his share of the income of the produce of the tort, instead of its being required that such income should be accumulated for the benefit of the first owner of an estate of inheritance. Such, however, is not the case, and it seems that the innocent

(i) *Whitfield v. Bewit*, *ubi sup.*

(k) *Duke of Newcastle v. Vane*, cited in *Whitfield v. Bewit*, *ubi sup.*

(l) In this case the distinction between waste committed by a *vis major* and by the tortious act of the

tenant for life seems overlooked. See *supra*.

(m) *Bewicke v. Whitfield*, 3 P. W. 268, n.

(n) *Whitfield v. Bewit*, *ubi sup.*

succeeding tenant for life is as rigorously excluded from the benefit of the tortious act as the tort-feasor himself (o).

Trustees to preserve contingent remainders, though they are not trustees to preserve the inheritance (p), but only trustees for the tenants for life, might restrain waste (q).

A tenant for life not impeachable for waste may recover the proceeds of sale of timber cut by a previous tenant for life impeachable for waste, even though the trees had been cut in due course of management, on the ground that the trees would otherwise have come to the second tenant for life, and that he could have done with them as he liked (r).

Successive  
tenants for  
life.

Equitable waste is such wanton waste of the property as a tenant for life or years not punishable for waste is yet in equity bound not to commit, such as pulling down the principal mansion-house (s), or other buildings (t), and cutting timber planted for ornament or shelter (u), or saplings at improper season (x).

How far in an executory settlement the tenants for life of realty should be made dispunishable for waste is discussed in *Stanley v. Coulthurst* (y).

A tenant in tail in possession is regarded for this purpose as having the fee, and may, without any special power in that behalf, commit any waste, even equitable waste.

Tenant in tail  
in possession.

(o) *Bewicke v. Whitfield*, 3 P. W. 267; *Bell v. Wilson*, L. R., 1 Ch. 303, 309.

(p) Per James, V.-C., in *Birch-Wolfe v. Birch*, L. R., 9 Eq. 689; 39 L. J., Ch. 345; 23 L. T. 216; 18 W. R. 594.

(q) *Garth v. Cotton*, 1 Ves. sen. 524; 1 Dick. 183; and *S. C.*, *White & Tudor's L. C. Eq.*

(r) Per Hall, V.-C., in *Lowndes v. Norton*, L. R., 6 C. D. 139; 46 L. J., Ch. 613; 25 W. R. 826; following *Gent v. Harrison*, Joh. 513, and distinguishing *Waldo v. Waldo*, 12 Sim. 107; and *Phillips v. Barlow*, 14 Sim. 263.

(s) 2 Vern. 738 (*Raby Castle case*).

(t) *Williams v. Day*, 2 Ch. Ca. 32.

(u) *Campbell v. Allgood*, 17 Beav. 623; *Morris v. Morris*, 15 Sim. 205.

(x) *Hole v. Thomas*, 7 Ves. 589. Under the Judicature Act, 1873 (36 & 37 Vict. c. 66, s. 25, sub-s. 3), in the absence of expression to the contrary, an estate for life without impeachment of waste does not confer any legal right to commit equitable waste. And see *infra*, p. 170.

(y) L. R., 10 Eq. 259; 39 L. J., Ch. 650; 23 L. T. 761; 18 W. R. 969. And see cases there cited.

If one have an estate tail, he will be enabled to commit waste in houses as well as in all the other parts of the estate, notwithstanding any restraint to the contrary; and no instance is to be found where a tenant in tail has been restrained from committing waste by injunction of the court. It was refused in the case of Mr. Saville of Yorkshire, who, being an infant and tenant in tail in possession, in a very bad state of health, and not likely to live to full age, cut down by his guardian a great quantity of timber just before his death to a very great value, and the remaindermen applied in vain for an injunction to restrain him (z).

After possibility of issue extinct.

But a tenant in tail, after possibility of issue extinct, is punishable for waste (a), unless, it seems, he has once been tenant in tail in possession before the possibility was extinct, in which case he is dispunishable, and has the property in the proceeds by reason of the fee which was once in him (b); but he may not, however, commit equitable waste (c).

Previously to the Judicature Act, 1873, there was a distinction between the right to commit waste in equity and at law. Now, by that act, so far at least as estates for life (d) are concerned, the distinction is abolished. It is thereby enacted that an estate for life without impeachment of waste shall not confer, or be deemed to have conferred, upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate (e).

Equitable waste.

Previously to that act, a tenant for life, made so without impeachment of waste, might at law have committed a

(z) *Saville's case*, cited in *Lord Glenorchy v. Bosville*, White & Tudor's L. C. Eq. 1.

(a) *Williams v. Williams*, 15 Ves. 419.

(b) *Ibid.* p. 430.

(c) *Ibid.* p. 43; *Garth v. Cotton*, 1 Ves. sen. 524; *Williams v. Day*,

2 Ch. Ca. 32.

(d) Other estates liable for waste, such, for instance, as that of tenant in tail after possibility of issue extinct, are not expressly affected by the statute.

(e) 35 & 36 Vict. c. 66, s. 25, sub-s. 3.

number of acts amounting to spoliation of the property, which in equity he was restrained from doing, where the name of equitable waste, as applied to acts so restrainable in equity, the courts of equity having always interposed to restrain the abuse of the power to commit waste (*f*).

One of the certain grounds for equitable interference seems to have been where the waste amounted to the destruction of the thing settled. Thus, in *Aston v. Aston* (*g*), after referring to the doctrine (established in *Lewis Bowles's case* (*h*)) that the words "without impeachment of waste" were sufficient to give the proceeds of the waste committed to the tenant for life, goes on to refer to instances where that power might be exercised contrary to conscience in cases where the act was the destruction of the thing settled; and he gives numerous instances where, on this ground, courts of equity interfered to prevent the spoliation (*i*).

(*f*) See *supra*, p. 163; and see *Garth v. Cotton*, L. C. Eq., and notes thereto, and *Craig on Trees*, p. 26.

(*g*) 1 Ves. sen. 263.

(*h*) 11 Co. 79.

(*i*) *Aston v. Aston*, *ubi sup.*; and see *Lord Barnard's case*, 1 Salk. 161; 2 Vern. 738; *Abraham v. Budd*, 2

*Freeman*, 55; 2 Sho. 69; *Cooke v. Whaley*, Eq. Ab. 400; *Packington v. Layton*, 2 Atk. 216. For further information as to equitable waste, see *S. C.*, *Craig on Trees*, and the learned note to *Garth v. Cotton*, *ubi sup.*

## CHAPTER XXIV.

### COVENANTS TO SETTLE AFTER-ACQUIRED PROPERTY.

A USUAL and valuable provision in marriage settlements is one providing for the settlement of after-acquired property of the wife. The construction of this clause, simple as it may seem, has often given rise to questions of much nicety, and it should be framed with much care.

Small sums  
not to be  
affected.

Covenants to settle after-acquired property are not generally intended to affect insignificant sums which it would be inconvenient from time to time to make the subject of settlement; and it is usual in covenants of this description to fix a limit of value, so that sums falling below that limit may not come within the scope of the covenant (a).

It has been decided on one such covenant that the amount named (in the case of a reversionary interest) does not refer to the value of the covenantor's interest in the fund, but to the value of the funds in which he has an interest (b). In the same case the covenantor was entitled to two sums of stock in reversion, to one in his own right, and to the other as one of the next of kin of a deceased brother. Taken together, the two sums exceeded the amount limited, but separately they were less. It was held that they were devised under one title, and that their aggregate value might be estimated so as to bring them within the covenant (c).

(a) This limit in practice varies to some extent in accordance with the wealth of the parties. Where the property is large a sum of 500*l.* is sometimes fixed, and where it is very small a sum of 50*l.* or 30*l.* may be chosen. A common limit

in moderate settlements is the sum of 200*l.*

(b) Per Lord Cairns in *In re Mackenzie's Settlement*, L. R., 2 Ch. 349.

(c) *Ibid.*

Notwithstanding that an absolute power of appointment over property is sometimes treated in law as equivalent to ownership, yet the terms of an assignment by a wife in a marriage settlement of her after-acquired property did not amount to a covenant to exercise a general power of appointment in conformity with the trusts of such settlement, and property over which the wife afterwards acquired a general power of appointment was not by that circumstance considered to be brought into settlement (*d*).

Fund subject to general power of appointment.

It seems that a covenant to settle after-acquired property exceeding a certain value may be evaded if a testator give to the covenantor a power of appointment only over the property given to him, and such person subsequently appoint to himself the whole of it, but by different deeds, each deed appointing a sum below the limit of amount required to be settled (*e*), and the fact that all such appointments are made on the same day will make no difference (*f*).

Covenant evaded by piecemeal appointment.

However, an appointment in such circumstances of a sum exceeding the amount limited will bring the fund appointed within the settlement, notwithstanding that the appointor reserves a power of revocation (*g*).

In covenants of this nature it is usually intended that only property acquired during the coverture should be brought into the settlement, and it is proper and now usual to qualify the covenant by the addition of words to that effect. It is thought, however, that such a qualification would in most cases be assumed to have been intended though it be not directly expressed. In *Stevens v. Van Voorst* (*h*), where there was a covenant by the wife to settle after-acquired property without the addition of the words "during

How far words "during coverture" implied.

(*d*) *Ewart v. Ewart*, 11 Ha. 276. See *Townshend v. Harrowby*, 27 L. J., Ch. 553. And see also *Vaughan v. Vanderstegen*, 2 Drew. 165; 23 L. J. (N. S.) Ch. 793; *Ramsden v. Smith*, *ibid.* 298; *ibid.* 753; *St. Aubyn v. Humphreys*, 22 Beav. 175; and cf. *Hilbers v. Parkinson*, L. R., 25 Ch. D. 200; 49 L. T. 502.

(*e*) *Bower v. Smith*, L. R., 11 Eq. 279; 40 L. J., Ch. 194; 24 L. T. 118; 19 W. R. 399.

(*f*) *Ibid.*

(*g*) *Ewart v. Ewart*, 11 Ha. 276, recognized in *Carter v. Carter*, L. R., 8 Eq. 556; 39 L. J., Ch. 268.

(*h*) 17 Beav. 305.

coverture" or the like, the property was held to affect property which she acquired after the death of her husband, Lord Romilly, M. R., being of opinion that he could not go beyond the words of the covenant by reading in words of restriction; but the case has been distinguished, or not followed in recent decisions, and cannot now be considered to be law. It is to be observed, however, that in nearly all such subsequent cases the court has to some extent founded its judgment on the particular facts or on the special wording of the covenant, so that the simple question can hardly be said to have been decided in them for all purposes; but in simple cases the question seems to have been finally set at rest by the decision in *In re Edwards* (i).

*Reed v.  
Kenwick.*

In *Reed v. Kenwick* (k) property acquired after the death of the husband by the wife was held not to be included in an unrestricted covenant to settle, but this case was decided principally on the ground (which, however, on the facts seemed doubtful) that the covenant was the covenant of the husband alone, and, consequently, that property in which he never acquired any interest was not bound (l). In another case the court, but with some hesitation, held that the words "during the life of the wife" was equivalent to during the joint lives of husband and wife (m).

In the more recent cases of *Dickinson v. Dillwyn* (n) and *Carter v. Carter* (o), however, it was held that a covenant in the usual form to settle future property without words limiting it during the existence of the coverture, yet only affected property acquired during the existence of the coverture. As a fact, in both these cases the property in question was acquired by the widow under the will of her husband, a point which was considered not without importance to the decision in each case. However, in the

(i) See *infra*.

(k) 24 L. J. (N. S.) Ch. 503.

(l) As a rule, however, words of agreement between the parties as to the covenant make it that of all parties.

(m) *Godsal v. Webb*, 2 Keen, 99, 121; 7 L. J. (N. S.) Ch. 103.

(n) L. R., 8 Eq. 546; 39 L. J., Ch. 266; 22 L. T. 647.

(o) L. R., 8 Eq. 551; 39 L. J., Ch. 268; 21 L. T. 194; 18 W. R. (Dig.) 124.

later case of *In re Edwards* (p), the two cases referred to *In re Edwards*. were expressly followed, and upon principles of a more general application. In this case James, L. J., delivering the judgment of the Appeal Court, and after consulting the Lord Chancellor, said that the primary object of a covenant to settle the future property of a wife was to prevent its falling into the sole control of the husband, and it therefore *prima facie* was to be supposed not to be intended to apply to property, the wife's title to which does not accrue until after the husband's death, and that in the absence of any expression, showing that a covenant of this nature was intended to have a more extended operation, it is to be construed as if the usual words "during the said intended coverture" had been inserted.

It is to be observed, that in *Dickinson v. Dillwyn* (q) one part of the after-acquired property falling into possession after coverture was expressly referred to in the covenant, and was accordingly held to be included in the settlement. It did not quite appear whether this would or not be considered to be the case since, after the decision in *In re Edwards* (r), which decision was founded on and followed the main decision in *Dickinson v. Dillwyn*. Effect of reference to particular fund.

In a subsequent case, however, this point arose, and it was decided that the fact that a specific property is referred to will not give to the covenant a construction at variance with the general rule that, in the absence of a contrary intention, a general covenant to settle will apply only to property acquired during coverture (s).

The next question which arises upon covenants of this nature is one of yet greater nicety and difficulty, namely, What constitutes "after-acquired property" within the meaning of the usual covenant? This question falls generally under two heads. Firstly, the person bound by the covenant may succeed to some life or other limited interest, What is "after-acquired" property.

(p) L. R., 9 Ch. 97; 43 L. J., Ch. 265; 29 L. T. 712; 22 W. R. 144.

(q) *Ubi sup.*

(r) *Ubi sup.*

(s) *In re Campbell's Policies*, L. R., 6 C. D. 686; 46 L. J., Ch. 265; 25 W. R. 268.



Where there  
is a present  
interest.

and a doubt may arise whether such interest ought to be settled, and if so, its value capitalized and added to the settled funds. Secondly, it often happens that the party bound by the covenant has already a vested present interest in some fund, which fund does not fall into possession till after coverture, in which case much difficulty has been felt how far such property can be considered as after-acquired, and therefore bound by the covenant; or whether it should be considered as having been already acquired at the date of the covenant, in which case it would not be bound by such covenant, and would in many cases escape the settlement altogether.

On the first head, it has been decided that the court will not hold liable to be comprised in the covenant property which will not "fit" the trusts of the settlement. On this ground it has been held that estates for life and annuities are not, as a rule, within the scope of such a covenant (*t*); and an estate tail is not within the usual covenant (*u*). The nature of each subsequent gift to a person bound by the covenant is to be considered. It is the nature, however, of the gift, not the intention of the donor, that is to be considered, and an expression of intention on his part that a gift is not to be included in a settlement may not be sufficient (*x*), which the terms of the covenant itself are not considered to covenant, is not to be brought in or applied to the property (*y*).

(*t*) Per Lord Hatherley, then V.-C. Wood, in *In re Mainwaring's Settlement*, L. R., 2 Eq. 487, 496; 14 W. R. 887; *Townshend (M.) v. Harrowby (E.)*, 6 W. R. 413. *Sid quare*, and cf. *Scholfield v. Spooner*, L. R., 26 C. D. 94, and *In re Allnutt, Pott v. Brassey*, L. R., 22 C. D. 275; 52 L. J., Ch. 270, 48 L. T. 370; 31 W. R. 438.

(*u*) *Hilbers v. Parkinson*, 49 L. T. 502; L. R., 25 C. D. 200.

(*x*) *Scholfield v. Spooner*, L. R., 26 C. D. 94; *In re Allnutt, ubi sup.*

(*y*) Per Lord Cottenham in *Thornton v. Bright*, 2 My. & Cr. 230.

Notwithstanding this doctrine, a clause negating the necessity of capitalizing annuities in the title and investing the proceeds is often inserted in settlements, and may occasionally be found useful as preventing questions. In *Heath v. Lewis* (V.-C. Hall, 9th February, 1877), the court held that certain property was after-acquired within the meaning of the covenant under the following circumstances:—By an ante-nuptial marriage settlement, made about the year 1862, a covenant binding on husband and wife was made for the settlement

A further question arises under this head in cases where property is subsequently given to a wife for her separate use. Much in such a case depends on the exact plan of the covenant or agreement. There are three points to be examined as to the effect of the covenant in such a case. Firstly, by whom the covenant or agreement is made; that is to say, whether by both husband and wife. Secondly, whether the covenant and agreement are that the husband alone shall do the acts necessary for the settlement of the property. And thirdly, what are the terms of the gift of the separate property, which sometimes express an intention that it shall not be included in the settlement.

Separate property of wife.

In *Douglas v. Congreve* (z), a legacy of a sum of consols, given to a wife to be independent of the control of the husband, was held to be not subject to the covenants, it being considered that such a covenant could only relate to property which in right of the wife became subject to the control of the husband, and not to property which by the will of the giver was to belong to her independently of him; but in this case there was apparently no assignment by the wife of her future property, and no covenant or words of agreement amounting to a covenant by her.

Where covenant by husband only.

In *Re Stephenson's Trusts* (a) a marriage settlement contained an assignment generally by the wife of all her future property to the trustees on the trusts of the settlement, and a further covenant by the husband to make over

of after-acquired property during coverture of the wife. At the date of the settlement the wife was entitled to a share of an ordinary mortgage debt, secured on certain funds which stood in court to the credit of another suit, and which funds could not be realized till the death of an annuitant who had a prior charge upon them. The marriage took place and the husband died on the 16th of March, 1876, leaving the wife surviving. The annuitant died on the 6th of March, 1876, ten days previously to the husband. On the death of

the annuitant the fund in court became available for payment of the mortgage debt and the arrears of interest thereon. On a petition in the suit for payment out of court of the fund, the court held that it was after-acquired during the coverture and bound by the settlement; but directed that so much of the share of the mortgage debt, as represented interest accrued since the date of the marriage, should be paid to the widow absolutely.

(z) 1 Keen, 410, 428.

(a) 3 D., M. & G. 969, 974.

all her after-acquired property to her for her separate use absolutely, and in this case the court held that the subsequent covenant of the husband cut down the general assignment of the wife, and that her after-acquired property belonged to her absolutely.

*Travers v. Travers.*

In *Travers v. Travers* (b), the husband alone covenanted to settle after-acquired property of the wife, and that he would do certain acts for that purpose; and it was held that property given to the separate use of the wife was not affected, as the terms of the covenant were only applicable to property over which the husband had control.

In another case, the settlement, in addition to and following the covenant by the husband, contained the words "and it is hereby agreed and declared" that the covenant should be carried out, words which usually are considered as making the covenant that of all parties executing the deed. But in this case (though the wife was taken to have joined in the covenant), yet as the covenant extended only to acts to be done by the husband, and was not that all parties should do things proper for settling the fund, it was held that after-acquired property of the wife given to her separate use was not bound, inasmuch as the husband had no power to settle the separate property of his wife than that of a stranger (c).

Effect of words "agreed and declared."

Where, however, the words "it is hereby agreed and declared" occurred, and the covenant was to the effect that all proper persons should do the acts necessary for settling the after-acquired property, a fund given to the separate use of the wife was held to be bound (d).

In *In re Campbell's Policies* (e), Hall, V.-C., commenting on *Ramsden v. Smith* (f), declined to give an opinion as to whether property given to a lady for her separate use would be bound by such a covenant in cases where the words of the

(b) 2 Beav. 179.  
(c) *Ramsden v. Smith*, 2 Drew. 298. And see *Milford v. Peill*, 2 W. R. 181.

(d) *Butcher v. Butcher*, 14 Beav. 222.  
(e) L. R., 6 C. D. 686; 46 L. J., Ch. 142; 25 W. R. 268.  
(f) *Ubi sup.*

covenant were sufficiently large to embrace the wife as one of the parties to do the requisite acts, without specifying by whom the acts were to be done. In *Ramsden v. Smith*, property given to the lady for her separate use was held not to be included, because from the language of the covenant all the acts which were to be done were either acts to be done by the husband or by those he had a right to compel, or acts to the doing of which his concurrence was necessary.

Where a marriage settlement contained a recital of an agreement that after-acquired property of the wife should be settled, but the operative part contained only a covenant by the husband, without the usual words "it is hereby agreed," or the like, it was held that the covenant was not to be controlled by the recitals, and did not bind the property of the wife, which, however, did not fall into possession during the coverture (*g*).

Effect of recital in settlement.

Where the recitals and operative parts of a deed are at variance, the operative part is to be regarded as officious and the recitals as inofficious; not that the recitals are to be wholly considered as inoperative, for they may be useful in explaining ambiguities in the deed (*h*).

It is unusual for the husband to covenant to settle after-acquired property of his own, and a general covenant of that nature may be bad under the bankruptcy law (*i*).

A wife may elect during coverture to confirm a covenant to settle after-acquired property entered into when she was an infant (*k*).

(*g*) *Young v. Smith*, L. R., 1 Eq. 180; 11 Jur. 963.

(*i*) See *ante*, Chapter XI.

(*h*) Per Romilly, M. R., *ibid*. See also *Moore v. Magraith*, Cowp. 9. A contrary rule, however, would seem to hold good as to releases.

(*k*) *Wilder v. Piggott*, L. R., 22 C. D. 263; 52 L. J., Ch. 141; 48 L. T. 112; 31 W. R. 377. And see *ante*, p. 10.

## CHAPTER XXV.

## THE POWER OF APPOINTMENT.

Power should  
extend to  
issue. In well-drawn marriage settlements the power to appoint given to the parents among the offspring of the marriage is made to extend not only to children, but to remoter issue. This is right, because it enables the donee of the power to provide for the children of a child who has died, or who is unfit to be personally benefited (*a*).

Where the provision is not thus extended, grandchildren cannot take under a gift to children; and if in such a case an appointment be made to children for life, with remainders over, all, except the life estate given to the children, will go as in default of appointment (*b*).

However, under a power to appoint among children, interests may be given to grandchildren where their parents (subjects of the power) concur (*c*); such an appointment amounting, in fact, to an appointment to the parents, and a fresh gift by them to the children.

Appointments, however, with a contemporaneous arrangement for the benefit of persons not objects of the power, may be open to exception, as being a fraud on the power; and, particularly so, where there is any benefit to the donee of the power.

Intention to  
benefit per-  
sons not  
objects.

The fact that, under the provisions of an appointment, whether such provisions appear upon the face of the instrument itself, or are to be gathered from extrinsic evidence, some persons who are not objects of the power may take interests in the appointed fund, either in conjunction with or in succession to persons who are objects of the power,

(*a*) *Dav. Prec.* vol. 3, pt. 1, p. 144. (*c*) *White v. St. Barbe*, 1 V. & B. 399.

(*b*) *Brudenell v. Elwes*, 7 Ves. 382.

is not itself sufficient to invalidate the appointment. The reports abound with cases in which such appointments have been upheld (*d*).

Nor, again, does the fact that the donee of the power may derive a benefit under the appointment necessarily render the appointment invalid. In *Beere v. Hoffmeister* (*e*), a husband and wife had power to appoint a fund to their children, which fund, in default of appointment, was settled on all the children who should attain twenty-one, and, in default, on the next of kin of the wife. There being but one child, aged three years and a-half, and the wife being seriously ill, the husband and wife appointed the whole fund to the child, reserving a power of revocation. The child died two years afterwards, and her father thereupon became entitled to the fund, and on the validity of the appointment being questioned, it was held good.

Where donee  
of power  
benefited.

On the other hand, in the case of *Wellesley v. Earl of Mornington* (*f*), an appointment made by a father in favour of his son, who, though of full age, was of unsound mind, and in very precarious health, and who shortly afterwards died intestate, was set aside at the instance of the daughter of the donee of the power.

The distinction in principle between the two cases is this,—in neither case was the contingent interest reserved to the donee of the power very remote, but in each case his intention in making the appointment had to be gathered from the surrounding circumstances, and while in the latter case it was evident that the intention was to benefit himself at the cost of his daughter, who was an object of the power, it was equally clear, in the former case, that the intention was not to benefit himself, except in the event of the death of his daughter, the sole object of the power (*g*).

(*d*) Per Baggallay, L. J., in *Roach v. Trood*, L. R., 3 C. D. 440; 34 L. T. 105; 24 W. R. 803.

(*e*) 23 Beav. 101.

(*f*) 2 K. & J. 143.

(*g*) Per Baggallay, L. J., in *Roach v. Trood*, *ubi sup.* See, further, as to frauds on powers, *Topham v. Duke of Portland*, L. R., 5 Ch. 40; 39 L. J., Ch. 259; 22

Old law as to  
exclusive ap-  
pointments.

Old law as to  
illusory ap-  
pointments.

In cases not falling within the remedial legislation on the subject (*h*), it is often necessary, in cases where there has been a power of appointment among a class, to see whether the power is or is not exclusive, that is to say, whether it is expressly provided that the power may be exercised in favour of some only of the class to the exclusion of others: otherwise, according to the old law, a substantial share had to be given to all the objects; and otherwise the appointment was liable to fail, as being what was termed "illusory." Afterwards, by statute (*i*), the doctrine of illusory appointments was abolished, yet an interest of some kind had, till the passing of the late act (*k*), to be given or allowed to devolve upon all objects of the power; and for this purpose a very small sum was sufficient to be left unappointed. A sum of ten shillings was sometimes the amount named, or, in the case of real property, a square yard (*l*). In all well-drawn settlements, however, the power was, as it usually still is, expressly made exclusive, so that this artifice was unnecessary (*m*). It was not, however, entirely without a reason that it was required that some part, however small, of the funds should be given to each object of the power, namely, to secure that the attention of the donee of the power was called to all the objects thereof (*n*). Although, as has been seen, it was sufficient if a merely nominal amount were given to each of a class to support the appointment of the residue to the others, yet it has not

L. T. 847; 18 W. R. 235; *Re Marsden's Trust*, 4 Drew. 594; *Bealey v. Bealey*, 25 Beav. 299; *Daniel v. Arkwright*, 2 H. & M. 95; *Re Gosset's Settlement*, 19 Beav. 529; *Cooper v. Cooper*, L. R., 8 Eq. 312; 5 Ch. 203; 39 L. J., Ch. 240; 22 L. T. 1; 18 W. R. 299; *In re Huish's Charity*, L. R., 10 Eq. 5; 39 L. J., Ch. 499; 22 L. T. 565; 18 W. R. 817; *Askham v. Barker*, 17 Beav. 37; *Vane v. Lord Duncannon*, 2 Sch. & Lef. 118; *Hamilton v. Royce*, 2 Sch. &

Lef. 315; *Wallgrave v. Tebbs*, 2 K. & J. 313; *Rucker v. Scholesfield*, 1 H. & M. 36.

(*h*) 37 & 38 Vict. c. 37.

(*i*) 1 Will. 4, c. 46.

(*k*) 37 & 38 Vict. c. 37.

(*l*) *Re Stone*, Ir. Rep., 3 Eq. 621.

(*m*) Dav. Prec. vol. 3, pt. 1, p. 144.

(*n*) Per Lord Hatherley in *Bulstee v. Plummer*, L. R., 6 Ch. 162; 39 L. J., Ch. 805; 23 L. T. 753; 18 W. R. 1091.

yet been decided that it was sufficient so to give a merely contingent interest (though it might be of real value) in the property in question. In one Irish case (*o*) there are strong *dicta* to the contrary; but the decision in a later Irish case (*p*) seems of an opposite character, and it is probable that the courts would lean in favour of the due execution of the power.

An exclusive appointment, where not authorized by the power, used to be simply ineffectual, and the property devolved as unappointed. Considerable difficulty was felt when there had been several separate appointments to members of the class, and the eventual result was that some of the objects were omitted, as to how far the earlier appointments might stand, notwithstanding the failure of the later appointments to satisfy the requirements of the power. It has been held that one bad appointment did not vitiate the others (*q*). As a rule, however, it was difficult to separate the last gift, because it happened to be last, and if the last gift, even though of residue, finally omitted some object of the power, all the gifts were liable to fail alike (*r*). But now, as to powers executed after the 30th July, 1874 (*s*), these questions cannot, it seems, arise, all powers being in effect treated as exclusive by that act.

Successive appointments.

A power of appointment by will only may, perhaps, as a general rule, be said to imply inability on the part of the donee to anticipate his discretion of appointment, by attempting to make a will of an irrevocable character. Such, at all events, is the case where the objects who take in default of appointment are a fixed class, such as children, or the like, in which case the donee of the power is in a quasi-fiduciary position to certain ascertained persons, and

Power to appoint by will.

(*o*) *Minchin v. Minchin*, 3 Ir. Ch. Rep. 167.

(*p*) *Re Stone*, Ir. Rep., 3 Eq. 621.

(*q*) *Rowley v. Rowley, Kay*, 242. And see *Young v. Lord Waterpark*, 13 Sim. 199, 202.

(*r*) *Bulleet v. Plummer, ubi sup.*, reversing the decision of *Malins, V.-C., L. R.*, 8 Eq. 585. See also *White v. Wilson*, 1 Drew. 298; and *Wilson v. Piggott*, 2 Ves. 351.

(*s*) 37 & 38 Vict. c. 37.



How far  
general power  
equivalent to  
ownership.

cannot in any way fetter or anticipate his discretion, which he must keep open till his death; but where there is a power to appoint generally, with remainder to the executors and administrators of the donee of the power, the latter is considered as being in fact absolutely entitled to the property (*t*). And it is probable that where the remaindermen are fixed, and are all able and willing to join, they and the donee of the power will similarly be considered to be jointly absolutely entitled; and if the donee of the power were to attempt to defeat by a subsequent exercise of the power a previous assurance made by him and them, under such circumstances it seems that the later appointee would take only subject to such previous assurance (*u*).

(*t*) *Page v. Soper*, 11 Ha. 324;  
*Devall v. Dickens*, there cited. And  
see Sugden on Powers and Farwell  
on Powers on this point, and on

powers generally.

(*u*) *In re Harvey's Estate*, L. R.,  
13 C. D. 221, 222; 49 L. J., Ch.  
3; 28 W. R. 73.

## CHAPTER XXVI.

## THE POWER OF SALE.

SINCE the passing of the Settled Land Act, 1882 (*a*), much of the old law as regards the usual power of sale over trust estates given to the trustees has become, or will gradually become, unimportant.

Previously to the Act of 1882 the power of sale in a settlement of real property was generally made exercisable with the consent of the tenant for life. Like any power of sale or variation of investment, it was not to be exercised wantonly; and it has been suggested that a purchaser might be entitled to require evidence on a sale under such a power that the trustees have in contemplation re-investment in some particular real investment, as otherwise the tenant for life might be influenced by the larger interest afforded if the proceeds were allowed to remain uninvested in land, and so desire a sale when not for the benefit of the whole inheritance. On this ground Lord Eldon said (*b*): "In a trust of this nature the most improvident course that can be adopted is to intrust the tenant for life with the execution of such a power, for it is generally the interest of the tenant for life to convert the estate absolutely into money, either with a view to sell another estate to his family, or for the ordinary purpose of getting a better income during his life."

In the same case Lord Eldon suggests that a particular investment in realty ought to be contemplated upon any sale, and, after stating that the expression "at a reason-

How far re-investment ought to be contemplated.

*Mortlock v. Butler.*

(*a*) 45 & 46 Vict. c. 38. See (*b*) See *Mortlock v. Butler*, 10 *infra*, p. 189. And see Appendix Ves. 308.  
of Statutes.

able price" in such a power means what appears such after due consideration, goes on to say: "The object of the sale must be to invest the money in the purchase of another estate to be settled to the same uses, and they (the purchasers) are not to be satisfied with probability upon that, but it ought to be with reference to an object at that time supposed practicable; or, at least, the court would expect some strong purpose of family prudence justifying the conversion if it is likely to continue money" (c).

Lord Cranworth's Act expressly negatives the necessity of inquiry as to any contemplated re-investment on the part of a purchaser on a sale made under that act (d), and the insertion of this clause seemed to lend colour to the theory, that otherwise the purchasers would have been entitled to inquire if the vendors had a particular re-investment in contemplation (e).

Not necessary  
to inquire as  
to re-invest-  
ment.

It is, however, considered in practice, and it is so laid down in text-books of authority (f), that a purchaser is not bound or even entitled to make such inquiry from trustees who are his vendors. There can, indeed, be no doubt that such an inquiry is unusual, and would probably be held not enforceable. It does not, however, appear clear how there can be (as suggested by Lord Eldon in such a case) a question between the trustee and cestui que trust, so as to give the latter a remedy against the former without affecting the title of the purchaser.

Tenant for  
life may buy  
on sale.

A tenant for life, whose consent on a sale is required, may yet buy the property. The law is quite settled, that when a power of sale is given to trustees, to be exercised at the request or with the consent of the tenant for life, the trustees may sell to him as they might to anyone else. Lord St. Leonards, in the third edition of his *Vendors and Purchasers*, published in 1826, treats the question which

(c) 10 Ves. 309.

(d) 23 & 24 Vict. c. 165, s. 2.

(e) The importance of the question is much narrowed by the Act referred to, as it supplements all

powers in deeds made since 28th August, 1860, unless negated.

(f) See (among others) *Dav. Prec.* 3rd ed. vol. 3, pt. 1, p. 564.

had formerly been considered one as having been set at rest by *Howard v. Ducane* (g), and refers to the refusal of the House of Lords to pass a bill for confirming such sales, on the ground that, by so doing, they would have thrown a doubt upon the law. The ground of the rule is, that the power of consenting to or requesting any exercise of the power of sale is given to the tenant for life for his own benefit, and that he is not in a fiduciary position as to it. He has, therefore, the same right to buy from the trustees that anyone else has (h).

Possibly, however, or even probably, a tenant for life purchasing part of the settled property might not be in the same position as a stranger as to the obligation to communicate what he knows. Having, by reason of his peculiar opportunities of obtaining information, he may be under some obligation to communicate circumstances which he knows, and which he knows the trustees do not know (i).

The circumstance that a settled estate is reversionary does not prevent its being sold under a general power of sale contained in the settlement, although the rights of the tenant for life are thereby accelerated to the prejudice of the remainderman (k). Reversionary estate may be sold.

A power to charge estates, however, cannot be accelerated and exercised by a second tenant for life upon the first tenant for life surrendering his life estate to him, for if the second tenant for life was to die in the lifetime of the first tenant for life, charges might have so been made which, under the words of the settlement, ought never to have been created (l).

Powers of sale or exchange, however, attached to a second estate for life may be accelerated by the surrender

(g) T. & R. 81.

(h) Per James, L. J., in *Dieconsen v. Talbot*, L. R., 6 Ch. App. 37; 24 L. T. 49; 19 W. R. 138.

(i) Per James, L. J., *ibid.*

(k) *Truett v. Tyssen*, 21 Beav. 441;

*Clark v. Seymour*, 7 Sim. 67; *Giles v. Homes*, 16 Sim. 359.

(l) *Truett v. Tyssen*, *ubi sup.* p. 244. And the same is the case as to accelerating powers of leasing. See *Coxe v. Day*, 13 East, 118.

Power kept  
alive on re-  
settlement.

of the previous life estate, as they do not diminish the inheritance (*m*).

On re-settlements of estates by father and son, or the like, it is usual, while conferring new powers, yet to keep alive the old powers of sale, and the like, which may have been attached to previous life estates, and an "overreaching clause" is usually inserted for the purpose, otherwise the estate may be clogged with family charges paramount to the new powers of sale (*n*).

Where a power of sale is confined to the life-tenancy it is paramount to an estate tail in remainder, and the fact that the life-tenant joins as protector to bar the estate in tail does not amount to a contract on his part not to concur in a sale (*o*).

And a power to consent to a sale, which was antecedent to an estate tail, was held to be undisturbed after a recovery suffered under the old law (*p*).

It is presumed that a power of sale, or of consenting to a sale, will usually continue to be given to the trustees in marriage settlements; if not, in order that there may be trustees who can receive notice under the Settled Land Act, 1882 (*q*), of the intention of sale by the tenants for life, it will be necessary expressly to nominate the trustees of the settlement to be trustees thereof for the purposes of this act. The scope and effect of the act, however, as to the powers of trustees for sale for the future, and how far they are capable of co-existing with the statutory power of sale conferred on all tenants for life, requires, and is receiving, the interpretation of judicial decision (*r*).

(*m*) *Blackwood v. Borrowes*, 4 Dr. & War. 222. But query, if this be so as to sales of reversionary property.

(*n*) *Dav. Prec.* vol. 3, pt. 2, pp. 1062, 1063, 1238. The suffering of a recovery under the old law might have destroyed all anterior powers, unless care were taken to preserve them, but in a re-settlement where an estate tail is barred under the Fines and Re-

coveries Act, it seems that estates and powers anterior to the estate tail would not be destroyed.

(*o*) *Hill v. Pritchard*, Kay, 394. Secus, if such a contract be made, see *Evans v. Jones*, Kay, 29.

(*p*) *Roper v. Hallifax*, 8 Taunt. 845.

(*q*) 45 & 46 Vict. c. 38.

(*r*) *Taylor v. Poncia*, L. R., 25 C. D. 646.

The Settled Land Act, 1882 (*a*), has revolutionized the system of the sale of settled land, and it is doubtful how far decisions on cases occurring previously will be applicable to cases coming within the purview of the act. The act gives definitions of the terms settlement, and of settled interests (*b*), and land is to be considered settled or not according to the state of facts at the time of the settlement taking effect (*c*). It also defines tenants for life, who, for the purposes of the act, are the persons beneficially entitled, who may be persons with concurrent interests (*d*); and it defines the meaning of the terms land, rent, and possession (*e*). By sect. 3 (*f*) an absolute power of sale is given to every tenant for life of the settled land, except as to the mansion and park (*g*). The sale money is to be invested in accordance with the terms of the settlement, or in the ordinary investments permitted to trustees, including the debentures of railway companies which have paid dividend on their ordinary stock for ten years previously, or in payment of charges or otherwise for the benefit of the inheritance (*h*). The sale money is to be paid to the trustees of the settlement or into court (*i*). If there are no trustees with a power of sale, trustees are to be appointed by the court (*k*); and before making any sale the tenant for life must give notice to the trustees (*l*). And the tenant for life is to be considered a trustee for all persons interested in exercising any power under this act (*m*).

Settled Land  
Act, 1882.

Powers of sale are liable to determine when the settlement has come to an end and the settled property has become, as it is termed, "at home." As regards undivided shares, however, it seems that the fact that some of the

Property  
"at home."

(*a*) 45 & 46 Vict. c. 38. See Appendix.

(*b*) *Ibid.* s. 2, sub-ss. 1—4.

(*c*) Sub-s. 4.

(*d*) Sub-ss. 5, 6. See *In re Jones's Estate*, W. N. 1883, p. 103.

(*e*) Sub-s. 5.

(*f*) *Ibid.* s. 3.

(*g*) Sect. 15.

(*h*) Sect. 21.

(*i*) Sect. 22.

(*k*) Sect. 38. See *Wheelwright v. Walker*, 23 C. D. 752; 52 L. J., Ch. 274; 48 L. T. 70; 31 W. R. 363.

(*l*) Sect. 45. See *Wheelwright v. Walker*, *ubi sup.*

(*m*) Sect. 53.

shares belong absolutely beneficially to persons *sui juris* is not sufficient to determine the power, and as long as there is a settled estate in any part of the property subverting the power remains in existence (*n*), and this may be the case even if all the beneficiaries are *sui juris* if it be according to the intention of the settlement, and the power do not offend against the rule as to perpetuities (*o*); or in cases where it is exercised within a reasonable time for the purpose of the division of the property (*p*).

Partition.

Trustees, though they have a power of sale, have not, unless it is expressly given to them, a power of partition; and in the absence of a specific power to concur in a partition, a deed of partition made by the trustees is not valid against their beneficiaries (*q*). Powers of partition are such powers as would be inserted in a settlement which is directed to contain usual provisions (*r*). A sale will generally now be made in a partition action instead of a partition, where it is desired by beneficiaries interested to the extent of a moiety (*s*).

It may not here be out of place to add a few remarks as to the power of trustees to make leases, a lease being indeed a kind of limited sale. Independently of statute, trustees have no power to lease, except from year to year. In one case, indeed, where a testator devised lands to trustees upon trust out of the rents and profits to pay two annuities, and, subject thereto, to permit A., and after him his wife, to receive the rents and profits during their respective lives, and after the death of the survivor he devised the lands to their children, it was held by Sir J. Leach, M.R., that the trustees could grant a valid lease for ten years, though it was unsuccessfully contended that it was their duty to let

(*n*) *In re Brown's Settlement*, L. R., 10 Eq. 349; 39 L. J., Ch. 845; 18 W. R. 945.

(*o*) *In re Cotton's Trustees*, L. R., 19 C. D. 624; 51 L. J., Ch. 514; 46 L. T. 813; 30 W. R. 610.

(*p*) *Peters v. Leves and East Grinstead Rail. Co.*, L. R., 18 C. D.

429; 50 L. J., Ch. 839; 45 L. T. 234; 29 W. R. 875.

(*q*) *Brassey v. Chalmers*, 4 De G., M. & G. 528.

(*r*) *Hill v. Hill*, 6 Sim. 136, 145. And see *ante*, p. 16.

(*s*) *Taylor v. Arnitt*, 1 Russ. & My. 501.

the lands only from year to year, and that the lease was binding only on those of the *cestuis que trustent* who had consented (s). This case, however, would probably not now be considered good law, and (independently of enabling statutes), it would seem that the court cannot, even if it be of opinion that it is beneficial for infants, grant a mining lease (t), nor yet a building or other lease (u). There is, however, a considerable difference between a mining and a building lease, the one involving an addition, the other an abstraction, from the property (x), and in an old case a building lease for sixty years was granted independently of any statute (y).

Now, under the Settled Estates Act, 1877 (z), persons with limited interests under settlements have large powers of leasing, with or without application to the court, according to the circumstances.

Under the Settled Land Act, 1882 (a), extensive powers of leasing are given to the tenants for life.

The statute lastly referred to (the various clauses of settled estates, which have already been the subject of frequent judicial decisions), is printed in the Appendix of Statutes hereto (b).

(s) See note (s), *supra*.

(t) *Wood v. Pattison*, 10 Beav. 541, 544.

(u) *In re Shaw's Trusts*, L. R., 12 Eq. 124; 25 L. T. 22; 19 W. R. 1025.

(x) Per Lord Langdale, M. R., in *Wood v. Pattison*, *ubi sup.*

(y) *Cecil v. Lord Salisbury*, 2 Vern. 225.

(z) 40 & 41 Vict. c. 18. See Appendix.

(a) 45 & 46 Vict. c. 38. See Appendix.

(b) As to the clauses proper to be inserted in the powers of leasing contained in settlements of real property, and the construction put upon the usual clauses, see Dav. Prec. vol. 3, pt. 1, pp. 479—543; Prideaux, S. C.



## CHAPTER XXVII.

## POWERS OF MAINTENANCE.

Old law. ORIGINALLY, by virtue of Lord Cranworth's Act (*a*), and now by the Conveyancing Act, 1881 (*a*), the insertion of clauses providing for the maintenance and accumulation, as regards the shares of infants entitled under marriage settlements, have been rendered unnecessary, and their insertion has now become unusual. Previously to Lord Cranworth's Act, in the absence of express provision, the courts had extended indulgence in this respect in favour of infants, for whom a provision had been made, on the contingency of their attaining twenty-one years, by a parent or a person standing *in loco parentis* (*b*), but this indulgence was not extended to other infants. The courts proceeded on the principle, that in cases where the person making the provision was a parent, or stood *in loco parentis*, the attaining twenty-one years was put in simply to fix the time of payment, and not to deprive the child of the benefit in the meantime, and accordingly it gave the income by way of maintenance.

Maintenance out of non-vested income. Notwithstanding the doubts of conveyancers, who seemed to have done their best to repeal the act (*c*), trustees were held entitled, under the 23 & 24 Vict. c. 145, to apply, for maintenance, the income of property held on trust for the infant contingently on his attaining the age of twenty-one years, though the income had not vested in him, in cases where,

(*a*) 23 & 24 Vict. c. 145, s. 26. For the provisions on this point in this act, the provisions of the 44 & 45 Vict. c. 41, s. 43, are now substituted. See Appendix of Statutes.

(*b*) *Chambers v. Goldwin*, 11 Ves. 1. See *Nicholson v. Northcote*, 3

Atk. 430; *Brown v. Temperley*, 3 Russ. 263.

(*c*) Per Jessel, M. R., in *In re Cotton*, L. R., 1 C. D. 232; 45 L. J., Ch. 201; 33 L. T. 720; 24 W. R. 243. And see Lewin on Trusts, 5th ed. p. 49; Dav. Prec. 3rd ed. vol. 3, p. 177.

if the infant attained the age of twenty-one years, he would get both the capital and the income. So, where a fund was bequeathed upon trust for all the children of A. who should attain twenty-one years in equal shares, and if there should be but one such child, then for that child, and A. died leaving one infant child, it was held that the fund might be applied in the maintenance of the child (*d*).

Though a liberal construction was put on the statute above referred to, and the courts were inclined to make whatever orders were possible for the maintenance of infants, yet section 26 thereof did not apply to a case where the infant, on attaining twenty-one years, would not be entitled to the interest on his legacy up to the time of payment. Thus, where a testator declared that his personal estate should be held upon trust, and out of the annual produce to raise for every daughter who should be under age and unmarried the yearly sum of 50*l*. for maintenance and education, and to accumulate the surplus income as part of his residuary estate, and he bequeathed to each daughter a legacy of 4,000*l*. if and when they should attain the age of twenty-one or be married, and gave his residuary estate to his son, it was held that the legacies to the daughters did not carry interest until the time of payment, and that the court had no power, under the 26th section of 23 & 24 Vict. c. 145, to apply any part of the income of the expectant legacies to the maintenance of the daughters (*e*). *In re George*.

As has been already pointed out, recent legislation has generally rendered unnecessary the insertion in settlements of the maintenance and accumulation clauses, at all events where the children's interests become vested on their attaining twenty-one years or sooner. Hotchpot and advance-

(*d*) *In re Cotton*, *ubi sup*.

(*e*) *In re George*, L. R., 5 C. D. 837; 47 L. J., Ch. 118; 26 W. R. 65. See *Hearle v. Greenbank*, 3 Atk. 716; *Wynch v. Wynch*, 1 Cox, 333; *Ellis v. Ellis*, 1 Sch. & Lef. 1. It is to be noticed that under the

corresponding section of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41, s. 43), the law is now altered in this respect. Per Kay, J., in *In re Judkin's Trusts*, 32 W. R. 407.

ment clauses, nevertheless, where, as is usually the case, the object of these provisions is desired, have still to be inserted (*f*).

Two funds.

Where there are two funds out of which an infant may be maintained, the court will give it out of that fund out of which it is most to the benefit of the infant that it should be given (*g*).

The power of maintenance given by sect. 26 of Lord Cranworth's Act (*h*) stopped short at minority, and does not apply to the interval between that period and a later period fixed for vesting (*i*); but it seems that the court in administration would have power to allow maintenance during the interval, though the trustees could not do it out of court (*k*). However, it seems that both sect. 26 of Lord Cranworth's Act and sect. 43 of the Conveyancing Act, 1881, are applicable only to cases where infants are to become entitled at twenty-one or previously, and in other cases the whole income goes to the residuary legatee (*l*).

The court in an action has power to control the discretion of trustees and allow maintenance, both past and present, though they are unwilling to make such allowance (*m*); and it had also power on petition to order maintenance to be paid to the father, instead of to the mother, of infants, though the latter course was directed in the trust (*n*).

Past maintenance.

Past maintenance will often be allowed out of the accumulation of income in cases where, if the application had been made earlier, the court would properly have allowed

(*f*) See *supra*, p. 153.

(*g*) *Martin v. Martin*, L. R., 1 Eq. 369; 14 L. T. 129; 35 L. J., Ch. 602; 14 W. R. 421; *Chambers v. Goldwin*, 11 Ves. 1.

(*h*) 23 & 24 Vict. c. 145.

(*i*) *In re Breed's Will*, L. R., 1 C. D. 226; 24 W. R. 200; 45 L. J., Ch. 191.

(*k*) *Ibid.*, per Jessel, M. R.

(*l*) Per Kay, J., in *In re Judkin's Trusts*, 32 W. R. 407. In cases

where the vesting is postponed beyond twenty-one years, maintenance, education and accumulation clauses will still be required.

(*m*) *In re Hodges, Dacey v. Ward*, L. R., 7 C. D. 754; 47 L. J., Ch. 335; 26 W. R. 390. But see *secus* in converse case *Brophy v. Bellamy*, L. R., 8 Ch. 798.

(*n*) *In re Roper's Trusts*, L. R., 11 C. D. 272; 40 L. T. 97; 27 W. R. 408.

it (o); and a parent may be allowed past maintenance without reference to his own ability to have provided such maintenance (p). And the court has power to charge reversionary interest of an infant with monies required for their maintenance; and a charge for the purpose on the reversionary interests of infants, notwithstanding that they might never vest in them, was allowed, provision being made by means of insurance for the replacing of the fund if the infants died under age (q). Where, however, there was a discretionary trust to apply infants' income for their maintenance, and it was so applied as a matter of course, without the exercise of any discretion, the parent had to refund the money.

Where property is given to children (as is usual) not to vest till they attain twenty-one or, if daughters, marry, it is proper to add a clause to provide that the portion of a child dying previously shall accrue to the survivors (r); and from this practice of conveyancers an argument has been deduced, that in the absence of such provision in usual cases the children attaining twenty-one will not take the whole fund.

However, where in a marriage settlement funds were settled upon the wife for life, with remainder to the children in equal shares, "to be a vested interest at their ages of twenty-one years," with a gift over to the husband in the event of all dying under twenty-one, and a reversion to the settlor in the event of there being no child born, but no clause of survivorship or accruer as to children dying under twenty-one, and there were five children, of whom four attained twenty-one and the fifth died an infant, it was

(o) *Brown v. Smith*, L. R., 10 C. D. 377; 48 L. J., Ch. 694; 40 L. T. 374; 27 W. R. 588. But cf. *In re Kerrison's Trusts*, L. R., 12 Eq. 422; 40 L. J., Ch. 637; 25 L. T. 57; 19 W. R. 967.

(p) *Ransome v. Burgess*, L. R., 3 Eq. 773; 36 L. J., Ch. 84; 15 W. R. 189.

(q) *Wilson v. Turner*, L. R., 22 C. D. 521; 52 L. J., Ch. 495; 48 L. T. 396; 31 W. R. 93; *De Witte v. Palin*, L. R., 14 Eq. 250; 26 L. T. 825; 20 W. R. 858, and *Ring v. Jarman* there cited.

(r) For the form of such a clause, see *Dav. Prec.* 3rd ed. vol. 3, pt. 2, pp. 933, 968.

held that the whole fund vested in the four children (s). In this case Lord Romilly, M. R., was of opinion that the trust was a trust for a class, namely, the children of the marriage who attained twenty-one, according to a sound rule of construction, and that the whole fund was therefore divisible among the four children.

(s) *In re Colleys' Trusts*, L. R., 1 Eq. 496; 14 W. R. 528. And see *Russel v. Buchanan*, 7 Sim. 628.

## CHAPTER XXVIII.

### THE INVESTMENT CLAUSE.

PREVIOUSLY to the passing of various and comparatively recent acts on the subject, trustees could only safely allow trust monies to be invested in the public funds or upon real securities in England or Wales (*a*).

Now, by virtue of various statutes, which will be briefly referred to, trustees are enabled to invest safely upon a number of securities, including the public funds and government securities of the United Kingdom, freehold and copyhold securities in England, Wales, or Ireland, the new and old East India Stocks, the stocks of the Banks of England and Ireland, and securities coming under the description of "securities, the interest of which is guaranteed by parliament," under the statute 30 & 31 Vict. c. 132 (*b*); and they are also in certain circumstances at liberty to invest on the debentures or debenture stock of railways in England (*c*).

Investments  
allowed by  
court.

In the numerous cases where statutory powers of sale and the like have been given by the legislature, there has been a great conflict of authority whether the proceeds are to be considered as "money under the control of the court" as regards investment within the meaning of the different enabling statutes, or whether such proceeds must be invested according to the old rules. The most recent cases on this point appear to decide against the more liberal

What are  
"funds under  
control" of  
court.

(*a*) As a fact, when funds are in possession of the court, it will lean strongly against investment on mortgage. See, however, *Ex parte The Dean and Canons of Manchester*, 10 Jur. 1091, where such an in-

vestment was allowed. And see *infra*, p. 204.

(*b*) See *infra*, p. 199.

(*c*) Under the Settled Land Act, 1882, as to monies arising under that act.

view of the matter (*d*); but it is probable that in future legislation it will be specially provided that funds derived in this manner may be invested in the same manner as funds strictly under the control of the court (*e*).

22 & 23 Vict.  
c. 35.

By comparatively recent legislation trustees may invest in certain further securities besides those originally authorized by the rules of the court. It is needless to add that these securities are such as have been considered practically to be completely safe, and that consequently they produce only a small excess of income over the investments previously allowed. The 22 & 23 Vict. c. 35 (*f*), provides, that where a trustee, executor or administrator shall not by some instrument creating his trust be expressly forbidden to invest any trust fund on real securities in any part of the United Kingdom, or on the stock of the Bank of England or Ireland or on East India Stock, it shall be lawful for such trustee, executor or administrator to invest such trust fund on such securities or stock, and that he shall not be liable on that account as for a breach of trust, provided that such investment shall in other respects be reasonable and proper.

India Stock.

By virtue of Lord St. Leonards' Act, 1860 (*g*), and the General Order made in pursuance thereof on the 1st February, 1861, cash under the control of the court may be invested in Bank Stock, East India Stock, Exchequer Bills and 2l. 10s. per Cent. Annuities, and upon mortgage of freehold and copyhold estates respectively in England and Wales, as well as in Consolidated 3l. per Cent. Annuities, Reduced 3l. per Cent. Annuities and New 3l. per Cent. Annuities. Another, but less wide power of investment, the details of which it does not appear neces-

(*d*) See, amongst other cases, *In re Southwold Rail. Co.'s Bill*, L. R., 1 C. D. 697; 45 L. J., Ch. 800; 24 W. R. 357; *In re Fryer's Settlement*, L. R., 20 Eq. 468 (Lands Clauses Consolidation Act); 45 L. J., Ch. 96; *Langmead v. Cockerton* (Partition Act), W. N. 1877, p. 43;

*In re Boyd* (cited in *In re Taddy*), L. R., 16 Eq. 332; 43 L. J., Ch. 191; 29 L. T. 243.

(*e*) This is so in the Settled Estates Act, 1877.

(*f*) Sometimes called Lord St. Leonards' Act, 1859.

(*g*) 23 & 24 Vict. c. 38, s. 10.

sary here to state, is given by a different act of the same session (*h*).

By the 30 & 31 Vict. c. 132, it is provided that India Stock created subsequently to the year 1859 shall be considered as included in the 22 & 23 Vict. c. 25 (*i*).

By the 30 & 31 Vict. c. 132 (*k*), it is provided that it shall be lawful for trustees to invest in any securities the interest of which is guaranteed by parliament, to the same extent and in the same manner as they may invest in real securities (*l*).

By the Metropolitan Board of Works (Loans) Act, 1871, it is enacted that persons entitled to invest money in public stocks or funds or other government securities may, unless forbidden by the instrument under which they act, whether prior in date to that act or not, invest the same in the consolidated stock thereby authorized.

Besides the general powers given by statute to trustees who have no express powers of investment, there have also been conferred by statute certain further powers upon those who are allowed by their trust deed usual powers of investment.

By the Improvement of Land Act, 1864 (*m*), trustees who have authority to invest money in land are empowered to invest money upon the charges executed under that act.

Charges under  
Improvement  
of Land Act.

By the Mortgage Securities Act, 1865 (*n*), it is enacted that where trustees have a general power to invest in or upon the security of shares, stocks, mortgages, bonds or debentures of companies incorporated by or acting under

(*h*) 23 & 24 Vict. c. 145, s. 25 (Lord Cranworth's Act).

(*i*) Indian railway debentures, the principal and interest of which is guaranteed by the Indian Government, are not within the statute. *Green v. Ansell*, W. N. 1867, p. 305.

(*k*) Sect. 2.

(*l*) It is thought that the Canadian 4½ per cent. guaranteed loan, and the Turkish 4½ per cent. guaranteed loan, both of which produce a considerably larger income than Consols, are within this section.

(*m*) 27 & 28 Vict. 114, s. 60.

(*n*) 28 & 29 Vict. c. 78, s. 49.



Railway  
debenture  
stock.

the authority of an act of parliament, they may invest in the mortgage debentures issued under that act (*o*).

By the Debenture Stock Act, 1871 (*p*), it is enacted as follows: "Where a power has before the passing of this act, or shall at any time hereafter be given to trustees to invest trust funds in the mortgages or bonds of a railway company or of any other description of company, such power shall, unless the contrary is expressed in the instrument creating the power, be deemed to include a power to invest such funds in the debenture stock of a railway company or such other company as aforesaid, and an investment of trust funds in debenture stock may be made accordingly," and the expression "trustees" is to apply to all persons in a fiduciary character (*q*).

The statutory power of the court as to investment conferred by the 23 & 24 Vict. c. 38, was held to apply to money paid into court under an act of parliament which contained an express provision as to the mode of investment (*r*).

*In re Wedderburn's Trusts.*

The Act of 1859 (*s*) provided that trustees might, as we have seen, invest in certain securities in cases where they should not by the instrument creating the trust be expressly forbidden to do so; but the act of the following year, which provides that trustees may invest in the stocks in which cash under the control of the court may be invested, contained no such exception; and it has been held that, inasmuch as the latter statutory power is without any exceptions, trustees may invest trust monies in any stocks in which cash under the control of the court may be invested, notwithstanding a prohibition in the settlement (*t*).

(*o*) This act has been varied by the Mortgage Debenture Act, 1870.

(*p*) 34 Vict. c. 27.

(*q*) Trustees have also powers to invest, under the Public Money Drainage Act (9 & 10 Vict. c. 101, s. 37), on charges under Improvement of Land Act (27 & 28 Vict.

c. 114, ss. 60, 61), in stock of Metropolitan Board of Works (34 & 35 Vict. c. 47, s. 13), and in securities of Isle of Man Government (43 & 44 Vict. c. 8, s. 7).

(*r*) *In re Birmingham Bluecoat School*, L. R., 1 Eq. 633.

(*s*) 22 & 23 Vict. c. 35.

(*t*) *In re Wedderburn's Trusts*,

It is desirable that a discretion given to trustees as to investment should be expressly continued to the trustees for the time being, as otherwise it may be considered to amount to a personal confidence in particular persons, or, at all events, not to be exerciseable by a single trustee; a discretion given to two particular persons may not continue in their successors (*u*).

It is not always right for trustees to transfer funds already properly invested into other securities, though the latter are allowable by the court. It was held in *In re Warde* (*x*), where the entire trust fund was already invested in Bank Annuities and the trustees had no express power to vary investments, that sect. 32 of Lord St. Leonards' Act, 1859 (*y*), did not apply.

Change of investment not always justified.

The court will not, in the absence of special circumstances making an increase of the income of the tenant for life beneficial to the remainderman, in the exercise of its discretion authorize a transfer of a trust fund from Consols to another security authorized by the general orders of the court, where such a transfer is likely to cause an ultimate diminution of the capital. So where a tenant for life petitioned to have a sum of Consols transferred into East India Stock, a redeemable stock and then considerably above par, the change was not allowed (*z*).

But it seems that it may be otherwise if the court be not called upon to interfere, and that a trustee may safely invest in any of the securities authorized by the general orders of the court, without incurring liability where they use their *bonâ fide* and unfettered discretion as to what they consider best for all parties (*a*).

Investment at above par.

L. R., 9 C. D. 112; 47 L. J., Ch. 743; 38 L. T. 904; 27 W. R. 53.

(*u*) *Zambaco v. Cassavetti*, L. R., 11 Eq. 445, per Romilly, M. R.

(*x*) 2 J. & H. 191, per Lord Hatherley, then V.-C. Wood.

(*y*) 22 & 23 Vict. c. 35.

(*z*) *Cockburn v. Peel*, De G., F. & J. 170, per Turner, L. J.

(*a*) *Hume v. Richardson*, 4 De G., F. & J. 32. See also *Re Mills' Will*, 27 Beav. 579; *Re Simpson's Trusts*, 1 Joh. & H. 90; *Equitable Reversionary Society v. Fuller*, *ibid.* 379; *Dodson v. Samuel*, 8 W. R. 259; *Re Fromow's Estate*, 8 W. R. 272; *Cohen v. Waley*, 9 W. R. 137; *Bishop v. Bishop*, 9 W. R. 549.

However, the effect of the cases seems to be that, as regards investments authorized by standing orders of the court, trustees are much in the same position as to their discretion as they would be in if the same investments were authorized in their particular trust deed, and it is to be noted that the rule of the court does not permit trustees in the exercise of their discretion in the selection of investments to select such as are of a perishable or wasting nature (*b*).

Securities to  
bearer.

Unless the wording of the investment clause in terms permit, trustees should not invest in securities payable to bearer, although they may be of a character otherwise authorized by the trust. A form directing investment "in the name or names of the trustee or trustees," will not allow such investment; but the words "or under the legal control," are sometimes added expressly to allow of such investment (*c*); but the addition of such words is of doubtful policy, owing to the facilities for fraud which may thereby be given (*d*); and sometimes, as a matter of caution, words expressly negating such a dealing with the trust funds are added (*e*).

Various restrictions have been added in the acts, giving statutory powers of investments, upon the powers of trustees to hold stock certificates to bearer (*f*).

Usual latitude  
of investment.

The latitude of investment allowed by the powers inserted in modern settlements, varies almost indefinitely in extent. In the case of a large property, where an investment at a small rate of interest will produce a sufficient income, something like the limit allowed by the rules of the Chancery Division of the court is not unfrequently

Sed quære whether trustees would be safe except in very special circumstances in investing in redeemable securities at a price above par.

(*b*) Per Romilly, M.R., in *Wilday v. Sandys*, L. R., 7 Eq. 457; 17 W. R. 603.

(*c*) Dav. Prec., vol. 3, pt. 2, p. 211.

(*d*) *Ibid.*, vol. 3, pt. 1, p. 53.

(*e*) *Ibid.*

(*f*) See 33 & 34 Vict. c. 71, s. 29 et seq. (as to the public funds); 26 & 27 Vict. c. 73, s. 4 (India Stock); 38 & 39 Vict. c. 83, s. 21 (stocks issued by local authority); 40 & 41 Vict. c. 59, s. 12 (colonial stocks); 43 & 44 Vict. c. 8, s. 7 (Isle of Man Stock).

adopted. As a rule, however, a larger liberty is permitted, extending to investment in the preference shares or higher securities of railways, public bodies and municipal corporations in Great Britain or in India (*g*); and it is thought that fairly large powers of investment are now thought convenient, notwithstanding a supposed reluctance on the part of intending trustees to act in trusts where they must exercise a discretion which may be troublesome as to the mode of investment (*h*).

It is usually the duty of trustees to convert wasting or perishable securities into securities of a permanent nature, the presumption being that the interests of all beneficiaries should be equally regarded, and the effect of non-conversion of wasting or perishable securities being generally to favour the tenant for life or other first taker at the expense of the successors. The rule, which is well ascertained, is laid down by Lord Eldon in the well-known case of *Howe v. Lord Dartmouth* (*i*).

The rule may, however, be varied by the special circumstances of the case, and by the express or implied directions of the instrument creating the trust; and questions of nicety often arise as to how far the provisions of the instrument, in the case of powers being given to retain existing investments and the like, do or do not suffice to take the case out of the rule of general application (*k*).

It is almost unnecessary to add, that trustees should be careful to investigate with proper pains both the title and value of any security, and the ordinary indemnity clauses

Wasting securities.

Valuation of securities.

(*g*) See *S.C. Davidson's Prec.* vol. 3, pt. 2; *Prideaux's Prec.* vol. 2.

(*h*) Trustees investing funds in modes authorized by their trust must yet make all proper inquiries as to the soundness of the investment; *Consterdine v. Consterdine*, 31 Beav. 330.

(*i*) 7 Ves. 149; *Caldecott v. Caldecott*, 1 Y. & C. Ch. 312; *Vaughan v. Buck*, 1 Ph. 75; *Pickering v. Pickering*, 4 My. & Cr. 289. The

same rule applies to all risky property as well as to actually wasting property.

(*k*) *Gray v. Siggers*, L. R., 15 C. D. 74; 49 L. J., Ch. 819; 29 W. R. 13; *Macdonald v. Irvine*, L. R., 8 C. D. 101; 47 L. J., Ch. 494; 38 L. T. 155; 26 W. R. 381; *Porter v. Baddeley*, L. R., 5 C. D. 542; *Brown v. Gellatly*, L. R., 2 Ch. 751; 16 L. T. 48.

cannot be regarded as a safe protection in case of any default in this respect (*l*). As to value, it is usual—as a rule of thumb—to say that two-thirds of the value is a safe amount to lend upon freehold land, and one-half their value upon freehold houses (*m*). Though trustees are not in themselves in any way to blame, yet they will be amenable, as a general rule, for a loss occasioned by their solicitors. In *Hopgood v. Parkin* (*n*), a trustee was held liable for the loss of a trust fund invested on a bad security by the default of his solicitor, who, taking a liquidated sum for costs, had not sufficiently investigated the title.

It may be otherwise, however, where actual fraud in concealing a defect of title is perpetrated on behalf of the vendor or mortgagor (*o*).

Trustee liable  
for agents.

The general question, how far a trustee is liable for defaults of his agent or broker, is too large a subject to be dealt with here in any detail. One of the principal cases on the subject is the early case of *Ex parte Belchier* (*p*), in which it was held that the assignee of a bankrupt who employed a broker to sell tobacco belonging to the bankrupt's estate, on the broker's failing to pay over the produce, was not liable to make good the loss (*q*).

The recent case of *Speight v. Gaunt* (*r*) has gone some way to meet the hardship of the case where a trustee has the misfortune to employ a dishonest broker, if he in doing so follow the usual and regular course of business such as would be adopted by men of ordinary prudence in making investments.

Remedy  
against  
trustee.

Where a trustee, in breach of trust, sells out trust money, the *cestui que trust* may elect whether he will have

(*l*) Dav. Prec., 3rd ed., vol 3, pt. 1, p. 39.

(*m*) Dav. Prec. *ibid.*; Lewin on Trusts, 7th ed., vol. 3, pt. 1, p. 39.

(*n*) L. R., 11 Eq. 74; 22 L. T. 772; 18 W. R. 908. This case was appealed against and the appeal compromised.

(*o*) 11 Eq. p. 78, *sed quære*.

(*p*) Amb. 218.

(*q*) The judgment of Lord Hardwicke in this case is well worth consulting at length.

(*r*) L. R., 9 App. Ca. 1 (affirming decision of Court of Appeal, reversing decision of Bacon, V.-C.; 22 C. D. 727; 52 L. J., Ch. 503; 48 L. T. 279; 31 W. R. 401).

it replaced or be paid the produce of it (*s*), together with 5*l.* per cent. interest (*t*).

This right of election, however, does not appear to extend where the trustee, having a right to invest in real estate or in the funds, does neither (*u*).

Where a trustee sold out trust money in breach of trust just before a dividend was due, it was held that no allowance could be made to the tenant for life, who would otherwise have been entitled to the dividend (*s*).

In one case it was questioned whether a power to invest trust funds at interest "upon" shares of a company, authorized the investment of the funds in the purchase thereof, or necessitated that the money should be lent at interest upon the security of a larger amount in value of shares (*x*). In the case in question the investment was in this respect thought proper.

Where power  
authorizes  
purchase.

But a power to invest "on the security of" certain stocks and shares, may not authorize investment simply in the purchase thereof (*y*).

As has been seen, even where trustees invest in securities authorized by their power, they are still bound to make every inquiry, and, in the case of investment in the shares of a company, should satisfy themselves that it is really a solvent one (*z*).

And though according to the terms of a trust every investment was to be made with the consent in writing of the tenant for life, it was, nevertheless, construed to be subject to the general equity, that the security was adequate and proper, and a trustee was justified in

(*s*) *Bostock v. Blakeney*, 2 Bro. C. C. 653.

(*t*) *Bate v. Scales*, 12 Ves. 402; *Harrison v. Harrison*, 2 Atk. 121; *Pocock v. Reddington*, 5 Ves. 794.

(*u*) *Dav. Prec.*, vol. 3, part 1; *Robinson v. Robinson*, 1 De G., M. & G. 247, and cases there cited.

(*x*) *Consterdine v. Consterdine*, 31 Beav. 330.

(*y*) *Harris v. Harris*, 29 Beav. 107. And as a rule, power to invest on real security or the like will not authorize a purchase outright of land; it being intended that the trustees should take a mortgage only.

(*z*) *Per Romilly, M. R.*, 31 Beav. 350.

instituting proceedings to have an inadequate security changed without such consent (b).

Where consent required.

Where there is power to make a particular investment with a particular consent, such consent must be strictly proved, and general prospective consent or subsequent ratification may not be sufficient. A power to lend money to the husband with the consent of the wife does not authorize a prospective consent to be given to future loans, but the consent must be given to each particular loan (c); and a parol consent will not be sufficient if a written consent be required (d).

Ratification not sufficient.

And where there was power to the trustees of a marriage settlement to advance 1,500*l.* to the husband of A. with her consent under her hand with two witnesses, and they advanced the sum without the consent of A., and A. afterwards by an instrument under her hand duly witnessed, admitted that the sum was advanced with her consent, it was held to be too late, as the actual advance had created a pressure upon her judgment, which gave her subsequent approbation a different character from the free consent required (e).

(b) *Harrison v. Thexton*, 4 Jur., N. S. 550.

(c) *Child v. Child*, 20 Beav. 22.

(d) *Cocker v. Quayle*, 1 Russ. & My. 535.

(e) *Bateman v. Davis*, 3 Madd. 98.

## CHAPTER XXIX.

## TRUSTEES CARRYING ON TRADE.

It is sometimes desired that a trade or business should be settled, or that the trustees of a settlement should have power to continue to carry on a trade or business. Great caution should be exercised by a trustee in accepting such a trust, for he may incur a double liability; in the first place, if he do not strictly follow the powers of the trust, he may be liable, if a loss occur to the estate, as for a breach of trust; and in the second place, though no breach of trust occur, he will be personally liable to the creditors of the business for the trade engagements, and though (assuming the trading to be proper) he will be entitled to reimbursement from the settled estate, this may not always amount to a sufficient indemnity. It has been said that executors do not usually carry on a trade *eo nomine*, and that if they do so they run great risk and, unless they do so under the protection of the court, act very unwisely (*a*).

Danger to  
trustee.

An executor (independently of authority given by the will) has no authority to trade, and if he take upon himself to trade the testator's estate will not be liable; and, moreover, such of the assets as can be specifically distinguished to be a part of the testator's estate will not pass to the trustee in bankruptcy if the trustee so trading should become insolvent (*b*).

In *Owen v. Delamere* (*c*), Bacon, V.-C., held that where

Right of  
creditor

(*a*) Per Lord Mansfield in *Barker v. Barker*, 1 T. R. 295.

(*b*) *Williams' Executors*, 7th ed. p. 1791. Of course, however, the consent of the beneficiaries may

modify the general rule.

(*c*) L. R., 15 Eq. 139; 42 L. J., Ch. 232; 27 L. T. 647; 21 W. R. 218.



against  
estate.

Where  
general estate  
not liable.

executors, with authority so to do, elected to carry on a business with a certain part of the testator's assets, a subsequent creditor of such business was not entitled to have administration of the estate, there being no suggestion of insolvency. In this case the Vice-Chancellor referred to the cases of *Ex parte Richardson* (d) and *Ex parte Garland* (e) as containing a clear exposition of the law on the subject, and showing the nature of such transactions to be as follows:—"An executor authorized to carry on business carries it on: he is liable for every shilling on every contract he enters into, and besides that, if he becomes bankrupt the persons who have trusted him have a right to say that that portion of the trust estate which was committed to him for the purpose of carrying on the business shall not be the subject of general administration. It is not the general estate of the testator, as in *Ex parte Richardson* (d), that is liable to this equity, but only so much as he has authorized to be employed in the business. There can be no proof whatever on the part of the testator's estate against the bankrupt's estate unless the executors have gone beyond the limit of their trust, in which case the amount of excess may be proved for in the bankruptcy as a debt due to the estate of the testator. Three principles are clearly and distinctly laid down in *Ex parte Garland* (e), are confirmed in *Ex parte Richardson* (d), and adopted in *Cutbush v. Cutbush* (f). There can be no doubt about the principles on which a court of equity deals with such a case, that is to say, that the court will give effect to the trust which has been created by the testator, and will keep separate and applicable only to purposes of the trust that estate which the testator designated and directed to be employed for that purpose."

A trustee is liable for partnership debts incurred during

(d) 2 Buck, 202; 3 Madd. 138.

(e) 10 Ves. 110.

(f) 1 Beav. 184. And see also on the subject *Hankey v. Hammond*,

Buck, 202; 3 Madd. 138; *McNeillie v. Acton*, 4 D., M. & G. 744. And cf. *Thompson v. Dunn*, L. R., 5 Ch. 573; 8 W. R. 854.

his trusteeship though his name does not appear. Thus, executors carrying on business in partnership on behalf of an infant child of the testator, were held liable for a bill drawn for the accommodation of the partnership and paid in discharge of a partnership debt, although their names were not added to that of the firm (*h*).

Where an executor or trustee is directed to carry on a trade and has a right to indemnity out of the assets of the estate, then the creditors of the trade carried on by him have a right to stand in the shoes of the trustee, and have direct payment of their debts out of such trust estate (*i*). Creditors' right to trustees' lien on estate.

But it is otherwise, as a rule, where the trustee has no right to carry on the business (*h*), though it seems it might be so in the case of a trustee for sale of a business, who thought fit to carry it on for a short time to prevent selling at a loss, in which case the trustee might be entitled to be recouped any loss from the estate, as for a kind of salvage (*l*), if he had exercised a wise discretion.

Where a trustee is authorized by a settlor or testator— *In re Johnson*. for it makes no difference which it is—to carry on a business with certain funds, which he gives to the trustee for that purpose, the creditor of the executor has a right to say:— “I had the personal liability of the man I trusted, and I have also a right to be put in his place against the assets; that is, I have a right to the benefit of indemnity or lien which he has against the assets devoted to the purposes of trade.” If, however, the trustee is in debt to the trust estate, then the creditors will have no claim against the estate, because nothing is due to the trustee (*m*), and his claim is subject to any equity against the trustee.

In *In re Leeds Banking Company (Dobson's case)* (*n*), it

(*h*) *Wightman v. Wightman*, 1 M. & S. 412. And see *Viner v. Cadell*, 3 Esp. 88.

(*i*) *In re Johnson*, L. R., 15 C. D. 553; 49 L. J., Ch. 745; 43 L. T. 372; 29 W. R. 168; *Ex parte Edmonds*, L. R.; 4 D., F. & J. 488.

(*k*) *Strickland v. Symons*, L. R., 22 C. D. 666.

(*l*) *Ibid.*; *Marlow v. Pitfield*, 1 P. W. 558.

(*m*) *In re Johnson*, L. R., 15 C. D. p. 552, *et ubi sup.*

(*n*) L. R., 1 Ch. 231, 242.

was held, on appeal (*o*), that an executor who had accepted shares in a company in his representative character must, nevertheless, be put upon the list of contributories in his own right.

Shares in  
companies.

The addition of the words "in trust," or "as trust disponees," added to the names of the trustees on the register of shareholders, is not sufficient to exclude the personal liability of the trustees (*p*). Those words may be added to mark the stock as trust property with benefit of survivorship, or similar purposes, and where trustees join in a contract of partnership for trading purposes, the mere designation of them as trustees will not exempt them from incurring the same personal liability in all respects as is undertaken by other shareholders (*q*).

*Buchan's case.*

It is unnecessary in this place fully to discuss the position of trustees and executors when they become shareholders as such in companies. Executors, however, appear to be rather better off than trustees. Thus, in *Buchan's case* (*r*), Earl Cairns, L. C., said :—"An executor whose testator has held shares in a joint stock company has generally one of two courses open to him. He may have the shares transferred into his own name, and become to all intents and purposes a partner in the company. He may, on the other hand, not wish to have the shares transferred into his name, and he ought in that case to have a reasonable time allowed him to sell the shares, and to produce a purchaser who will take a transfer of them. In any case, where the bank transfers the shares into the name of the trustee's executor, this House would require to be satisfied that the transfer had been authorized by a distinct and intelligent request on the part of the executor." And in the same case Lord Selborne said :—"The case of trustees, who take a transfer

(*o*) Reversing the decision of *Kindersley*, V.-C.

(*p*) *Muir v. City of Glasgow Bank*, 4 App. Cas. 337; 40 L. T. 339; 27 W. R. 603.

(*q*) *Ibid.*, following *Lumsden v. Buchanan*, 4 Macq. 950.

(*r*) L. R., 4 App. Ca. 549. One of the numerous cases arising out of the disastrous failure of the City of Glasgow Bank.

of shares in their names, differs in principle from that of executors, who merely intimate their title as executors to a company in order to claim and exercise the rights which belong to them as the legal representatives of their testator. Trustees have not, in any proper sense of the word, a representative character, but executors have. Having representative rights, it is impossible that they should not be entitled to produce the legal evidence of them to the company, for the purpose of having their title in some way recorded and recognized without making themselves personally liable."

It is often doubtful how far a trustee can resign, so as to escape liability when holding shares in a company, after the stoppage or notorious insolvency thereof (s). Resignation of trustee.

The creditors of trustees who carry on a business have, as has been seen, an advantage in that; as a rule, they have a double right of resort, first to the trustees personally, and then (through them) to the trust estate.

It is, however, possible for trustees to contract, so as to bind the trust fund only, but apt and express words must be used, and the description of them "as trustees," or the like, is not in itself sufficient. In the case of *Muir v. City of Glasgow Bank* (t), Lord Cairns, L. C., said:—"Whether, in any particular case, the contract of an executor or trustee is one which binds himself personally, or is to be satisfied only out of the estate of which he is the representative, is, as it seems to me, a question of construction, to be decided with reference to all the circumstances of the case: the nature of the contract, the subject-matter on which it is to operate, and the capacity and duty of the parties to make the contract in the one form or in the other. I know of no reason why an executor, either under English or Scotch law, entering into a contract for payment of money with a Trustees may contract to bind estate only.

(s) See on this point, and as to what constitutes acceptance of shares by a trustee, *Bell's case*, *Alexander Mitchell's case*, *Rutherford's case*, and *Ker's case* (all arising out of the same failure), L. R., 4 App. Ca. 547, and cases there cited.

(t) L. R., 4 App. Ca. 355; 40 L. T. 339; 27 W. R. 603.

person who is free to make the contract in any form he pleases, should not stipulate by apt words that he will make the payment, not personally, but out of the assets of the testator. If, for example, A. B., the executor of X., contracted to make a payment as executor of X., and as executor only, to C. D., it would be difficult to suppose that any obligation, except an obligation to pay out of assets, was intended. C. D., in the case supposed, would have authority to accept a contract so limited, and the words used could have no meaning, and could be referred to no object other than that of limiting responsibility."

Incidence of  
losses.

Where a business is settled and there are successive tenants for life, losses occurring during one life estate should, it seems, be paid out of the profits of the next, and not out of the corpus (*u*).

(*u*) *Upton v. Brown*, L. R., 26 C. D. 588.

## CHAPTER XXX.

## TRUSTEES' COSTS AND REMUNERATION.

THERE are two well-established rules as to the costs of trustees, including trustees of marriage settlements; one, that a trustee may not (in the absence of express provision) make a profit out of his trust; the other, that he is entitled to be repaid out of the trust estate his costs, charges and expenses properly incurred in the administration of the trust.

The first rule follows as of course from the rule of general application as to all persons in a fiduciary position. In the leading case of *Robinson v. Pett* (a), Lord Talbot said: "It is an established rule that a trustee, executor or administrator shall have no allowance for his care and trouble: the reason of which seems to be that on these pretences, if allowed, the trust estate might be loaded and rendered of little value. Besides the great difficulty there might be in settling and adjusting the *quantum* of such allowance, especially as one man's time may be more valuable than that of another; and there can be no hardship in this respect upon any trustee, who may choose whether he will accept the trust or not."

Trustee may not profit by trust.

The principle has been fully recognized by the House of Lords in a modern case (b). In this case Lord Cairns said, that such a principle is one of the first principles in regard to the doctrine of trusts, a principle founded upon no technical rule of law, but upon the highest principle of morality; and the rule that a trustee may not make a

Rule one of morality.

(a) 3 P. W. 249, 251; S. C., Smith's L. C., vol. 2, p. 206.

(b) *Aberdeen Town Council v. Aberdeen University*, L. R., 2 App.

Ca. 544. The rule is common to all jurisprudence. See per Lord O'Hagan.

profit out of his trust may even prevent his taking advantage of incidental rights arising from his legal ownership, such as a right of shooting over the trust estate (c).

A trustee (though he will not be allowed any profit costs) will be allowed all his costs and expenses out of pocket, such as travelling expenses, fees to counsel, and the like, so long as they are properly incurred (d).

Solicitor  
trustee.

It remains to consider, in the case where a trustee is able professionally to do work required by the trust, how far, if he do the work, he may be remunerated for it. The case, perhaps, most frequently arises where a solicitor is appointed a trustee, and, as a general rule, it may be laid down that in such cases the trustee cannot be allowed any payment (except of costs out of pocket) for his services.

Although it is the general rule that a solicitor acting as trustee cannot charge for his services (e), yet the rule is not quite so inflexible and inelastic as is sometimes supposed, and there are cases where such charges have been allowed. In one important case (f) it was held, that where a body of several trustees employed professionally one of their number, who was a solicitor, that the solicitor could charge his full costs, on the ground that he might charge fully the costs incurred on behalf of the trustees other than himself, and that the costs were not increased by his being associated with the others (g).

*Cradock v.*  
*Piper.*

The doctrine of *Cradock v. Piper* is one of extensive application, inasmuch as in the greater number of cases a solicitor who is trustee is so jointly with others, and acts on their behalf as well as his own. The case, however,

(c) *Webb v. Earl of Shaftesbury*, 7 Ves. 480.

(d) *Worrall v. Harford*, 8 Ves. 8; *Dawson v. Clarke*, 18 Ves. 254.

(e) *Robinson v. Pett*, 3 P. W. 249; S. C., Smith, L. C., vol. 2; *Moore v. Frowd*, 3 My. & Cr. 45; *Bainbrigg v. Blair*, 8 Beav. 588; *Todd v. Wilson*, 9 Beav. 486; *Fraser v. Palmer*, 4 Y. & C. 515.

(f) *Cradock v. Piper*, 1 M. & G. 664. See *New v. Jones*, *ibid.* 668 (n).

(g) Per Cottenham, L. C., in *Cradock v. Piper*, *ubi sup.*, on appeal from order allowing the costs. The order made on appeal was to the following effect:—"It appearing that the costs incurred on behalf of the said J. W. (the solicitor) and his trustees were not in any way increased by his acting for himself and them jointly. Appeal dismissed, &c."

though decided on appeal is now one of doubtful authority, and would probably be only followed, if followed at all, in cases where the facts were precisely similar. Thus it has been held applicable only to business carried on in court, and not to work done where there has been no suit (*h*); and it would probably be now unsafe to rely generally upon the principle of the decision (*i*). Where a solicitor is a trustee his partners cannot, any more than himself, make any profit costs out of business done by them for the trust estate (*k*); unless, it seems, there is a distinct agreement that the whole of such profits is to be received by the partners other than the trustee only (*l*).

Independently of the somewhat doubtful principle laid down in *Cradock v. Piper* (*m*), a solicitor may be paid his professional costs in cases where he can make a special case to withdraw himself from the application of the general rule. Thus, Lord Eldon gave a retrospective allowance to a solicitor trustee of a will (notwithstanding that he had received a legacy of 200*l.*) after a reference to chambers, to inquire if it were for the benefit of the estate that the trustee should act (*n*).

Special circumstances.

It is desirable, however, that such an application should be made before the trust is accepted, and that if the nature of the trust is such that a trustee ought not to accept it without compensation, a special case ought to be made to the court before the trust is so accepted (*o*); and the matter is one not of right, but of the discretion of the court (*p*).

It is very usual in settlements, where it is desired that

Clause allowing charges.

(*h*) *Lincoln v. Windsor*, 9 Ha. 158.

(*i*) See *Broughton v. Broughton*, 2 Sim. & Gif. 422; 3 De G., M. & G. 160.

(*k*) *Christopher v. White*, 10 Beav. 523.

(*l*) *Clarke v. Carlon*, 7 Jur., N. S. 441; 9 W. R. 568. In this case an agreement was proved that the partners of the trustee should solely

do the business and receive the profits; *sed quare*, how far this case would now be followed.

(*m*) *Ubi sup.*

(*n*) *Marshall v. Holloway*, 2 Swanst. 432, 453.

(*o*) *Broksopp v. Barnes*, 5 Madd. 90.

(*p*) *Morison v. Morison*, 4 My. & Cr. 215, 224,



a solicitor should be one of the trustees, to insert a clause authorizing him to make and be paid his professional charges. Such a cost is strictly construed, and must expressly allow the trustee to make profit costs (*p*). The insertion, however, of such a clause is quite usual and proper (*q*).

Under the old law, an executor who had renounced could not charge for his services rendered to the testator's estate. This was because he was at liberty at any time to accept the executorship, and thus an art might be practised by executors to get themselves out of the rule (*r*); but now the reason of this would appear to be removed, as the right of an executor who has renounced wholly ceases (*s*).

Trustees  
entitled to  
their costs.

Although not allowed to make any profit, trustees are in a favoured position as to being paid their costs as between solicitor and client out of the estate; and their costs will include their charges and expenses properly incurred, though this as to court matters should be expressly mentioned in the order for taxation. Moreover, the trustee has a lien on funds belonging to the estate in his possession for such costs.

By the Rules of the Supreme Court, 1883 (*t*), costs generally of all proceedings in the Supreme Court, including the administration of estates and trusts, are placed in the discretion of the court; but this is not to prejudice the right of an executor, administrator, trustee or mortgagee who has not unreasonably instituted or carried on, or resisted, any proceedings of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division (*u*).

Right of ap-  
peal if de-  
prived.

The right of a trustee to his costs properly incurred, like that of a mortgagee, is a matter of contract, and is

(*p*) *Moore v. Froud*, 3 My. & Cr. 45.

(*q*) See remarks of Hatherley, L. C., in *The Imperial Credit Association v. Coleman*, L. R., 6 Ch. 570; 40 L. J., Ch. 745; 43 L. T. 372; 29 W. R. 168. And see

*Davidson's Precedents*, vol. 3, pt. 2, p. 773 (note).

(*r*) *Robinson v. Pett*, 3 P. W. 251.

(*s*) 20 & 21 Vict. c. 77, s. 79.

(*t*) Order LXV.

(*u*) *Ibid.* r. 1.

not in the discretion of the judge, though he may be deprived of his costs for misconduct. It is not the practice of the court in modern times to discourage persons from becoming trustees by inflicting costs upon them if they have done their duty, or even if they have committed an innocent breach of trust, otherwise only unscrupulous persons might undertake trusts for the purpose of getting something out of them (*x*).

Therefore the costs of a trustee are not within sect. 49 of the Judicature Act, 1873, and an appeal may be brought from a decision in respect of them (*y*).

(*x*) Per Jessel, M. R., in *Turner v. Hancock*, L. R., 20 C. D. 303; 51 L. J., Ch. 517; 46 L. T. 750; 30 W. R. 480.

(*y*) Per Jessel, M. R., and Cotton and Lindley, L.JJ., in *Turner v. Hancock*, *ubi sup.*, disapproving decision of James, Baggeallay and Brett, L.JJ., in *In re Hoskins' Trusts*,

L. R., 6 C. D. 281; 35 L. T. 935; 25 W. R. 779 (which followed *Taylor v. Dowlen*, L. R., 4 Ch. 697), and following *Cotterell v. Stratton*, L. R., 8 Ch. 295; 42 L. J., Ch. 417; 28 L. T. 218; 21 W. R. 234; and *Farrow v. Austin*, L. R., 18 C. D. 58.

## CHAPTER XXXI.

## BANKRUPTCY OF TRUSTEE.

A TRUSTEE does not, *ipso facto*, forfeit his office by being bankrupt. Under the 32 & 33 Vict. c. 71 (*a*), and previous Bankruptcy Acts, the Court of Chancery had power to remove a bankrupt (*b*) trustee; and a similar power is contained under the last act (*c*).

Court can  
remove bank-  
rupt trustee.

How far, however, a Court of Equity will proceed to exercise this discretion, depends on the circumstance of the case. Bankruptcy itself is not evidence of a crime, and though misfortune is very often another name for imprudence, it is not always so; and if the bankrupt trustee is honest, and subsequently obtains a good pecuniary position, he may not be removed (*d*); but otherwise he will be removed on the petition of the *cestui que trust* (*e*).

The consideration of the effect of the bankruptcy of a trustee on the trust estate belongs more properly to a treatise on bankruptcy, or the law of trusts in general, than to the subject of this work. It may, however, be convenient briefly to refer to it here. If a trustee become bankrupt, the trust estate will not, as a rule, pass over to the trustee in bankruptcy; indeed the contrary was expressly enacted by the Bankruptcy Act, 1869 (*f*), and this is repeated in the last Bankruptcy Act (*g*).

(*a*) Sect. 117.

(*b*) Including a trustee who has liquidated by arrangement.

(*c*) 46 & 47 Vict. c. 52, s. 117.

(*d*) *In re Bridgman*, 1 Dr. & Sm. 167.

(*e*) *In re Adams' Trusts*, L. R., 12 C. D. 634; 28 W. R. 163; 48 L. J., Ch. 613; 41 L. T. 667; *Re Barber's Trusts*, L. R., 1 C. D. 43; 45 L. J., Ch. 62; 24 W. R. 264; *In re Renshaw's Trusts*, L. R., 4

Ch. 783.

(*f*) 32 & 33 Vict. c. 71, s. 15, sub-s. (1).

(*g*) 46 & 47 Vict. c. 52, s. 44, sub-s. (1), whereby it is enacted that the property of the bankrupt divisible among his creditors is not to include "property held by the bankrupt in trust for any other person." And see Baldwin on Bankruptcy, 4th ed. p. 126 *et seq.*

If the trustee be a bare trustee, that is, for the present purpose, a trustee without any beneficial interest, then not even the legal estate in the trust premises will vest in the trustee in bankruptcy, such a trustee not being in the position of the general assign of the insolvent (*h*); but the beneficial interest (if any) of the bankrupt trustee will of course pass to his creditors (*i*). If a creditor of a trustee take the trust goods in execution, he will himself become a trustee thereof (*k*).

Trust property does not pass to creditors.

Executors, administrators, and other persons holding *in auter droit*, are on the same footing as express trustees as regards the principle (*l*).

Where, however, the bankrupt trustee has a substantial beneficial interest the legal estate may pass, but subject to the equities, to the bankrupt's trustee (*m*).

Where the trust estate has been converted, but the proceeds can be distinctly traced or ear-marked, the product will follow the nature of that which produced it, and may be claimed *in specie* on behalf of the trust (*n*).

How far trust funds can be followed.

Creditors of a tenant for life of chattels, such as heirlooms, plate, furniture, and the like, cannot seize them as in his apparent ownership where the legal estate is (as should always be the case in such settlements) in trustees (*o*). Where the legal estate in such chattels is in the tenant for life, the question is one of considerable difficulty, inasmuch as it is difficult for the creditors of such tenant for life to have any enjoyment of such articles *in specie* without endangering the interests therein of the remaindermen (*p*).

(*h*) Lewin, 7th ed. p. 218, and cases there cited; Griffith & Holmes, p. 359; and cf. *Scott v. Surman*, Willes, 402.

(*i*) Griffith & Holmes, p. 359.

(*k*) *Foley v. Burnell*, 1 Br. C.C. 278.

(*l*) *Ex parte Butler*, 1 Atk. 210, 213; *Ex parte Ellis*, *ib.* 101; *Viner v. Cadell*, 3 Esp. 88.

(*m*) Lewin, pp. 220, 221, and case there cited.

(*n*) *Ex parte Barber, re Anslow*,

28 W. R. 522; 42 L. T. 411 (a strong case); *Taylor v. Plumer*, 3 M. & S. 535; *Scott v. Surman*, Willes, 404. As to following trust funds in the hands of a stockbroker who has notice of the trust, see *Ex parte Cooke*, L. R., 4 C. D. 123; *Pearson v. Scott*, L. R., 9 C. D. 198.

(*o*) *Earl of Shaftesbury v. Russell*, 1 B. & Cr. 666.

(*p*) See *Foley v. Burnell*, 1 B. C. C. 278.

The order and disposition clauses of the recent Bankruptcy Act (*q*), and of similar preceding ones, do not appear to apply where the possession of the person having possession of the property is consistent with the title; cases where the possession can be referred to the title not being within such statutes (*r*). This is so where the possession is that of a tenant for life, or that of an administrator or trustee.

Funds held in  
*auter droit*.

Thus, where plate, the property of the husband, came into the possession of his widow or administratrix, and she married again, and the second husband became bankrupt, it was held by Lord Hardwicke that his assignees were not entitled, inasmuch as the administratrix had them *in auter droit*, and her husband could have them in no better title; and the plate was consequently given up to the children of the first husband, their mother having died (*s*).

To come within the clause there must be both a true owner and a reputed owner, the one being distinct from the other (*t*); and it seems, also, that the true owner must have knowledge of the reputed ownership (*u*).

Infants' property.

The property of a person under disability to consent may also, it appears, be protected from the operation of the clause (*x*). Thus, where the wife of a bankrupt administered to her father, and the husband, one Viner, continued the business of the father for the benefit of the wife and children, who were infants, his possession was not an ordering and disposition within the old clause, Lord Eldon stating, that the statute did not apply where the parties interested were not capable of asserting their rights (*x*).

(*q*) 46 & 47 Vict. c. 5, s. 44, sub-s. 3.

(*r*) *Ex parte Martin*, 19 Ves. 494. This case was decided on the 21 Jac. 1, c. 19, on the reputed ownership clause, whereon subsequent statutes have been modelled.

(*s*) *Ex parte Marsh*, 1 Atk. 158; and cf. *Yate Lee's Bankruptcy*,

p. 166.

(*t*) *Joy v. Campbell*, 1 Sch. & Lef. 328; 2 K. & J. 560; *Yate Lee*, p. 168, and cases cited; and cf. *Ex parte Barber, Re Anslow*, 28 W. R. 522; 42 L. T. 411.

(*u*) *Yate Lee*, p. 166, and cases there cited.

(*x*) *Viner v. Cadell*, 3 Esp. 88.

If a trustee with a beneficial interest have committed a breach of trust, he or his trustee in bankruptcy cannot claim any of the trust property until the default has been made good, the *cestuis que trust* having a lien on the interest of the defaulting trustee on the trust estate (y); and this may be the case though the defaulting trustee may have become entitled thereto derivatively, as, for instance, as being one of the next of kin of a beneficiary who has died intestate (z).

(y) *Irby v. Irby*, 25 Beav. 632.

(z) *Jacobs v. Rylands*, L. R., 17 Eq. 341; 43 L. J., Ch. 280.

## CHAPTER XXXII.

## HEIRLOOMS.

Legal mean-  
ing of term.

THE nature of heirlooms is often misconceived. In fact, the term "heirlooms" is strictly applicable only to a limited and not very important class of objects. Heirlooms have been described as follows by eminent authority:—

"If nobleman, knight, esquire, &c. be buried in a church, and have his coat armor and pennons with his arms, and such other ensigns of honour as belong to his degree or order, set up in the church, or if a gravestone or tomb be laid or made, &c. for a monument for him, in this case albeit the freehold of the church be in the parson, and that these be annexed to the freehold, yet cannot the parson take them or deface them, but he is subject to an action to the heir and his heirs in the honour and memory of whose ancestor they were set up. And so it was holden Mich. 10 Ja. and herewith agree the laws in other countries. And some hold that the wife or executors that first set them up, may have an action in that case against those who deface them in their time. And note, that in some places chattels as heirlooms (as the best bed, table, pot, pan, cart and other dead chattels moveable) may go to the heir, and the heir in that case may have an action for them at the common law, and shall not sue for them in the ecclesiastical court; but the heirloom is due by custom and not by the common law. And the ancient jewels of the crown are heirlooms, and shall descend to the next successor, and are not devisable by testament. An heirloom is called *principalium* or *hereditarium*" (a). Though legally the

(a) Co. Litt. Bk. I. 18 (b).

signification of the term "heirloom" is thus limited, yet it is usual, in ordinary language, to comprise under the term "heirlooms" any personal property so settled as to accompany, so far as possible, a settled estate in land, and to descend to the person for the time who is under the settlement what is popularly, though not very correctly, termed the heir; and jewellery, pictures, plate, furniture, and the like, when so settled, are often spoken of as "heirlooms."

Popular  
meaning.

It is often the earnest desire of settlors where there is a large landed estate settled, and especially where a title exists in the family, to make heirlooms of the last description which may follow, as far as possible, the land and belong to the head and representative of the family for the time being.

There are two special difficulties to be borne in mind in attempting to attain this end. One arises from the fact that the law does not allow an entail to be created in personal estates, personalty not being within the statute *De donis*. Consequently, where an infant takes only an estate tail in realty he takes an absolute interest in personalty (b).

Difficulty as  
to limitation  
of heirlooms.

In this manner the intended "heirlooms," on the death of the infant tenant in tail, may pass to his personal representatives, and be finally severed from the land which descends to the next tenant in tail. To prevent this separation of the heirlooms and the estate, it is necessary that they should not vest in an infant tenant in tail, but should go over on the death of such infant. In doing this another danger arises, that of making the disposition void for remoteness as tending to create a perpetuity: for it is clear that should an infant tenant in tail die leaving issue, such issue may also die in infancy leaving issue, and the vesting of the personal estate or intended heirlooms may

Should not  
vest in tenant  
in tail "by  
purchase."

(b) *Scarsdale v. Curzon*, 1 J. & H. 40. The use of the term "heirlooms" has been thought, however, in itself sufficiently to explain the

intention of the settlor so as to prevent such vesting. See per Lord Hardwicke in *Trafford v. Trafford*, 3 Atk. 348, *sed quære*.



be extended for an indefinite time beyond the life in being and the twenty-one further years allowed by law (c). The proper method of avoiding the danger is to direct that the intended heirlooms shall not vest absolutely in any tenant in tail *by purchase* who shall not attain the age of twenty-one years. In this manner the prohibition against vesting is confined, in effect, to the children of a tenant for life, and remoteness is avoided. The distinction between taking by purchase and by descent is well known (d).

When "by purchase" may be implied.

Although it is most desirable, in order to prevent question, to limit the divesting clause to the case of infant tenants in tail *by purchase* only, yet there have been cases where it has been considered that the words "tenant in tail" in such a clause, by necessary implication, mean "tenant in tail by purchase." The principal case in which this was so considered was the case of *Christie v. Gosling*, in the House of Lords (e). In this case it was apparently thought that the expression "tenant in tail" in the particular context did not mean any person answering the description of heir male of the body of the sons of the tenant for life successively, but such tenant in tail as could also take the personalty under the gift, that is to say, the first tenant in tail after the life tenant, that is to say, the tenant in tail by purchase (f). Lord St. Leonards dissented from the opinion of the other lords, founding his judgment in a great measure on the case of *Dungannon v. Smith* (g), and holding if the

(c) *Dungannon v. Smith*, 12 Cl. & F. 346; *Ware v. Polhill*, 11 Ves. 257; *Tollemache v. Coventry*, 2 Cl. & F. 611.

(d) A purchase is always intended by title and most properly by some kind of conveyance, either for money or some other consideration, or freely of gifts; for that is in law also a purchase. But a descent, because it cometh merely by act of law, is not said to be a purchase; and accordingly the makers of the act of parliament, 1 Hen. 5, c. 5, speak of them that have lands or tenements by pur-

chase or descent of inheritance. And so it is of an escheat or the like, because the inheritance is cast upon, or a title vested in, the lord by act in law, and not by his own deed or agreement; Co. Litt. 18(b). (e) L. R., 1 H. L. 279; 15 L. T. 40; 35 L. J., Ch. 667.

(f) The decision was that of Lords Chelmsford (C.) and Cranworth, Lord St. Leonards dissenting.

(g) *Ubi sup.* and cf. *Harrington v. Harrington*, L. R., 5 H. L. 88; 40 L. J., Ch. 716; 20 W. R. (Digest, 25).

gift of the personalty was written out at full length with the proviso it would offend against the law of perpetuities. In a more recent case (*h*) the decision in *Christie v. Gosling* was followed, and the case of *Dungannon v. Smith* (*i*), where the whole gift was held void for remoteness distinguished on the ground that the principle of the latter case was that the disposition of the leasehold premises was to be to a person answering two descriptions, *i.e.* the heir male of the body taking by descent from A. T. and of the age of twenty-one years: circumstances which might possibly not combine for many generations (*j*).

The decision in *Christie v. Gosling* was also expressly followed in the subsequent case of *Martelli v. Holloway* (*k*), where Lord Westbury lays it down that, whether it is so expressed or not, these provisions are limited to tenants in tail by purchase, as there can be no other tenant in tail of personal estate than he who takes by purchase. And his Lordship said that he would so decide, even without authority.

Sometimes directions are given that gifts of this class shall be operative only so far as the rules of law and equity permit, or the like. The value of these words in rendering valid a limitation which would otherwise offend against some rule of law or equity is very doubtful. It is settled (though it is much to be regretted) that such words do not create an executory interest (*l*), and such a gift cannot be modelled so as to give it full effect and validity, but it must be dealt with as it is found (*m*).

(*h*) See note (*g*), *ante*.

(*i*) 12 Cl. & F. 546.

(*j*) *Dungannon v. Smith*, *ubi sup.*; and cf. *Tollemache v. Earl of Coventry*, 2 Cl. & F. 611.

(*k*) L. R., 5 H. L. 532; 42 L. J., Ch. 26. And cf. *Foley v. Burnell*, 1 Bro. C. C. 274; 4 Bro. C. C. 319; *Scarsdale v. Curzon*, 1 Jo. & Hem. 40; *In re Johnson's Trusts*, L. R., 2 Eq. 716.

(*l*) Per Lord Westbury in *Harrington v. Harrington*, L. R., 5 H.

L. 101.

(*m*) Per Hatherley, L. C., *ibid*. It used to be held otherwise, and that a court could in such cases execute the trust according to the general intent of the settlor. See per Lord Hardwicke in *Trafford v. Trafford*, 3 Atk. 347; and see also *Gower v. Grosvenor*, 5 Madd. 337; and *Rowland v. Morgan*, 2 Ph. 764.

## CHAPTER XXXIII.

## CONVERSION.

Land may be  
made money  
or money  
land.

INCIDENTALLY, in reference to settlements, arises the question of conversion. The principle of this well-known doctrine is clearly stated by Sir Thomas Sewell, M. R., in the case of *Fletcher v. Ashburner* (a), which may be considered a leading case on the point (b). He there says that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted, and this in whatever manner the direction is given, whether by will, by way of contract, marriage articles, settlement, or otherwise, and whether the money is actually deposited or only covenanted to be paid, whether the land is actually conveyed or only agreed to be conveyed, inasmuch as the owner of the fund or the contracting parties may make land money or money land. Though this is the clear universal rule, special circumstances may create a difficulty as to its application.

Equity exists  
between real  
and personal  
representa-  
tives.

In *Oxenden v. Lord Compton* (c) and *Walker v. Denne* (d), it was considered that, as between real and personal representatives, there was no equity to make the property what it was not in fact, and that chance, that is to say, the actual state of the property, decides between them what shall be real and what personal estate; but this view is now clearly untenable, as the Court is obliged to inter-

(a) 1 Bro. C. C. 497, 499; *Pul-  
teney v. Lord Darlington*, 1 Bro. C.  
C. 223.

(b) *White & Tudor*, L. C., vol. 1.

(c) 2 Ves. 70.

(d) Per Lord Rosslyn, L. C., 2  
Ves. 177.

fere, and it is not correct to say that it does not interpose between volunteers, when in fact it gives to the executor money which the instrument has given to the heir, or *vice versa* (e). Thus, money being once clearly impressed with real uses as land, and one of those uses being for the benefit of the heir, the impression will remain for his benefit, and to put an end to that impression it must be shown either that the money was in the possession of a person who had in himself both the heirs and executors, or he must do some act to denote a change of his intention as to the devolution of the property upon either (f). In *Pulteney v. Lord Darlington* (g), it was decided that if money directed to be laid out in land was once "at home" Money "at home." in the possession of the person under whom the heir and executor claimed, then the heir could not take; but if it stood out in a third person he might take. When once "at home" in the hands of the person entitled *quidcunque viâ*, it is not necessary that the person should exercise any formal or even intentional election, if it appear from his acts that he treats the property as being what it is in its actual state, and not as subject to any notional conversion. In *Harcourt v. Seymour* (h) the Vice-Chancellor, afterwards Election. Lord Cranworth, said:—"I take the law upon the cases to be perfectly clear, that where, by a settlement, land has been agreed to be converted into money, or money to be converted into land, a character is imposed upon it until somebody entitled to take it in either form chooses to elect that instead of its being converted into money, or instead of its being converted into land, it shall remain in the form in which it is actually found. There can be no

(e) *Wheldale v. Partridge*, 8 Ves. 235.

(f) *Ibid.*

(g) 1 Bro. C. C. 223. "A case much agitated, and upon which all the great lawyers were consulted," per Lord Eldon in *Wheldale v. Partridge*, *ubi supra*.

(h) 2 Sim. (N. S.) 12; and cf. *In*

*re Gordon*, L. R., 6 C. D. 531; *Dixon v. Gayfere*, 17 Beav. 433; *Pulteney v. Lord Darlington*, 1 Bro. C. C. 223; *Davies v. Ashford*, 15 Sim. 42; *Mutlow v. Bigg*, L. R., 1 C. D. 385; 45 L. J., Ch. 22; 34 L. T. 273; 24 W. R. 409; *Crabtree v. Bramble*, 3 Atk. 680; *Wheldale v. Partridge*, 8 Ves. 235.

doubt that that is the law, and the only question in each particular case is whether there have been acts sufficient to enable the Court to say that the party has so determined." And after commenting on the argument addressed to him that there must be the intention to convert, he went on to say that he did not think that that was the correct view of the law; on the contrary, it was quite sufficient if the Court saw that the party meant it to be taken in the state in which it actually was. Whether he did or not know that but for some election by him it would be turned into land was quite immaterial.

In the early case of *Crabtree v. Bramble* (i), several questions arose on the point of election, firstly, as to the power of a person entitled *quâcunque viâ* to land directed to be sold, subject to a life estate, to elect during the existence of the life estate; secondly, as to the power of such a person so to do, when a beneficiary only, the legal estate being outstanding; and, thirdly, as to what acts were evidence of such intention. In this case, Lord Hardwicke, after laying down the principle that equity follows the contract of parties in order to preserve their intent by carrying it into execution, and that the equity depends on this principle, that what has been agreed to be done for valuable consideration is considered as done, which holds in every case except in dower; and, therefore, that where money is to be laid out in land, there the court will make it have the property of land, and that there is the same rule of lands to be converted into money; and further, that no election could determine the question as to those claiming under the trust, but as to those only who claimed as volunteers (k).

*In re Davidson.*

In the modern case of *In re Davidson, Martin v.*

(i) 3 Atk. 680.

(k) *Ibid.*, p. 688. It is to be noted that in this important case Lord Hardwicke was of opinion that it was very doubtful whether the trust for sale had, under the

circumstances of the family, ever come into existence, as the case in which a sale was directed had never happened (*ibid.* p. 687). This consideration may possibly diminish the authority of the principles to be

*Trimmer* (*l*), it was decided on appeal by the Lords Justices (*m*), reversing the decision of the V.-C. Hall, that persons had sufficiently elected to take real property in its actual state, though it was not held in its entirety by one person, but was held in undivided shares (*n*). In this important case the facts were as follows:—An estate was vested in H. D. and S. upon trust, after the death of a person who died in 1863, to sell it with all convenient speed. The proceeds of it belonged as to one moiety to D.'s wife absolutely for her separate use, subject to a charge of 500*l.* in favour of a legatee, and as to the other moiety to S. absolutely, and the property was well adapted for building purposes, but the bulk of it was subject to an old lease, of which twenty-six years were unexpired. In March, 1864, D. and his wife paid off the 500*l.* In 1864, the three trustees let for three years part of the property not comprised in the old lease, and in 1867, and again in 1869, D. and S. who had survived H. granted similar leases for three years. In 1865, S., who was the acting trustee and managed the property, had plans prepared for laying out the property for building, and in the same year a bill was brought into Parliament for authorizing a railway to pass through the estate, and a petition against it was presented on behalf of the owners and trustees of the H. P. estate, which stated that it was their intention to lay out the estate for building. Mrs. D. died in 1870, in the lifetime of her husband. There was no direct evidence that she had concurred in the leases, the preparation of the plans, or the petition to Parliament. Under these circumstances, it was held that the parties had elected to take the property as real estate, and that Mrs. D.'s share went to her heir-at-law as realty, and not

derived from the portion of the judgment above referred to. But the case is cited as an authority on the question of election by the Master of the Rolls in *In re Gordon*, *ubi supra*.

(*l*) L. R., 11 C. D. 341; 27 W. R.

(Dig.) 199; 40 L. T. 444; 48 L. J., P. D. & A. 54.

(*m*) James, Baggage and Bramwell, L.JJ.

(*n*) An important point in considering these cases. See per V.-C. Hall in *In re Davidson*, *ubi supra*.

to her husband as personalty. Here, all parties interested were held to have concurred. Unless you get the concurrence of all parties no election can take place (o).

Re-conversion  
by conduct.

Reliance in this instance, as always in the consideration of such cases, was put on the special circumstances that the dealings of the parties entitled with the property were inconsistent with the continuance of the trust for sale. This appears in the judgment of James, L. J., who says, "It is to be presumed that that is in accordance with what all the parties thought at that time that it was better not to sell the property, but to keep it for building residences, and this is quite sufficient to show that such was their intention. All that is required here is to show an intention on the part of all the parties beneficially interested that the property should not be converted into money, but kept as land. Looking at all the facts, they seem to me to show that having regard to the circumstances of the property as it stood at the time when the trust for sale came into operation, it was the intention of the parties interested to keep it as land until the expiration of the lease. For this purpose it is quite clear that the trust for sale must have been put an end to, for an agreement between both the beneficial owners that the property should not be sold until the expiration of the lease is wholly inconsistent with the continuance of the trust for sale. There was therefore what is called a reconversion of that which was directed to be converted and was not converted by the trustees" (p).

Incidents of  
conversion.

Land directed to be sold is subject to all incidents of personalty, and money directed to be laid out in the purchase of land to all the incidents of realty, including curtesy (q), but formerly excepting dower (r), though now,

(o) Per Malins, V.-C., in *Meek v. Devenish*, L. R., 6 C. D. p. 571; 36 L. T. 911; 25 W. R. 688.

(p) *In re Davidson*, *ubi supra*.

(q) *Sweetapple v. Bindon*, 2 Vern. 536; *Cunningham v. Moody*, 1 Ves.

sen. 174; *Dodson v. Hay*, 3 Bro. C. C. 404, 408.

(r) The principle of conversion "holds in every case except in dower." Per Lord Hardwicke in *Crabtree v. Bramble*, 3 Atk. 687.

since by the Dower Act (*s*), by which women are made dowable out of the equitable estate of their husbands, it is probable that this exception may have ceased to exist. It was, however, considered that the Crown had no equity to have money directed to be converted into land so converted, in order to cause an escheat (*t*). Money, however, equitably converted into land was not liable to forfeiture on conviction of felony (*u*).

A married woman, entitled to money devised to be laid out in land, was examined apart from her husband whether she would have it laid out in land or elect to receive it as money (*x*).

Election by married woman.

In *Meek v. Devenish* (*y*) it was decided that a person who was entitled absolutely in a contingent event might, before the happening of the contingent event, elect; the V.-C. Malins being of opinion that it is not necessary that a man should be absolutely entitled to property when he gives notice of election, but that when he becomes entitled the previous notice is operative (*z*).

Contingent interest.

The rule that money directed to be laid out in land shall be considered as land holds only when the quality of land is imperatively fixed on the money (*a*). Where there is a discretion of any kind there may be no conversion, and in the case of *Walker v. Denne* (*b*), where the money was directed to be laid out in the purchase of land or very long terms of years, Lord Rosslyn said that it was a necessary circumstance that where it was by will the will, and where by contract the deed, must decisively and definitively fix upon the money the quality of land, and that that was not

No conversion where trust discretionary.

(*s*) 3 & 4 Will. 4, c. 105.

(*t*) *Walker v. Denne*, 2 Ves. 170; but in this case it was doubtful if there were an imperative direction to convert, but "with that circumstance to convert for the Crown is too extraordinary for a Court of Equity." Per Lord Rosslyn, *S.C.*, p. 185.

(*u*) *Re Harrop's Estate*, 3 Drew. 726.

(*x*) *Binford v. Bawden*, 1 Ves. 512. And as to the examination for the purpose of declaring her election of a married woman before the Court or before commissioners, see also *Pearson v. Brereton*, 3 Atk. 71.

(*y*) L. R., 6 C. D. 566 *et ubi sup.*

(*z*) *Ibid.* p. 571.

(*a*) *Walker v. Denne*, 2 Ves. 184.

(*b*) *Ibid.*



so in that case, for the testator had left it perfectly at large whether in the conversion of the property it should be converted into inheritable property or that species of landed property that would be distributable as personal.

*Mutlow v.  
Bigg.*

In *Mutlow v. Bigg* (c) a testator, after giving certain legacies, devised a freehold house to trustees for sale, the proceeds to be considered part of his personal estate, and gave his residuary real and personal estate to the same persons beneficially. The trustees paid all the legacies except two out of other parts of the testator's estate, and kept the house unsold, granting a lease of it to a tenant. The house remained unsold for fifty years, and the two legatees permitted their legacies to remain, during the whole of that time, unpaid, without requiring a sale or any formal security on the house. It was held in a suit by the personal representative of one of the trustees and residuary legatees against the real and personal representatives of the testator for the administration of his estate, that they had, by their conduct, elected to take the house as reconverted into real estate, and that the assent of the unpaid legatees might be inferred and the bill was dismissed accordingly.

(c) L. R., 1 C. D. 385; 45 L. J., Ch. 22; 34 L. T. 273; 24 W. R. 409.

## CHAPTER XXXIV.

## FAILURE OF THE OBJECT OF THE SETTLEMENT.

QUESTIONS have often arisen as to the effect of dispositions made in consideration of marriage if the marriage fail to take place. In practice the difficulty is to a great extent avoided by not executing the settlement till within a short time previously to the intended marriage (a).

According to Pothier, contracts made in consideration of marriage are made on the tacit condition that the marriage takes place, and are consequently void if it be not so (b); but the real difficulty in cases of this kind, in dealing with funds made subject to trusts in consideration of marriage, seems to be that the parties, though the marriage be broken off (and even after an intervening marriage), may after all marry each other, and the consideration for the original trusts of the settlement be thus restored (c).

Marriage not taking place.

In *Robinson v. Dickinson* (d), a settlement was made in contemplation of a marriage which proved to be invalid by mistake for want of the proper consents, and it was held that a Court of Equity had power to operate upon the transaction in a way a court of law could not act, and that

Mistake.

(a) Dav. Prec., vol. 2, pt. 1, p. 10 (n). Sometimes a provision is inserted to the effect that if the marriage does not take place within a limited time, such as twelve months, the settlement shall be void. See *Prideaux*, Prec., vol. 2, p. 194.

(b) Les conventions . . . sont toutes faites sous la condition si nuptiæ sequantur, 6 Pothier (ed. Dup.), 46, 47. Cited in *Page v. Horne*, 9 Beav. 570.

(c) *Thomas v. Brennan*, 25 L. J., Ch. 420.

(d) 3 Russ. 399. But it seems to be otherwise as to the legal estate at law. See *Brighton v. Sandilands*, 3 Taunt. 376. In the case of *Robinson v. Dickinson*, the parties were subsequently validly married, and executed a second settlement differing from the first, and the two settlements thus came into collision.

it would not hold that a transaction founded entirely on mistake ought to be considered binding, and this, not only as to the non-enforcement of a covenant to settle, but also as to funds which had been actually transferred.

In *Page v. Horne* (e), a settlement made by the intending wife in consideration of her marriage, between herself, her husband and a trustee for her, by which her property was settled upon her and her children, was revoked previously to marriage by a second deed to which the trustee was not a party. In a suit after the marriage, to set aside the original settlement, it was held that, notwithstanding that the master had found that the lady had executed the original settlement under a mistake as to its operation, and believing that the effect would be to make the funds subject to her absolute disposal, and that she had voluntarily executed the deed of revocation, yet that the revocation was invalid, there being too great a probability of her being under the influence of her husband.

In *Chapman v. Bradley* (f), it was held by Lord Romilly that the consideration of natural love and affection, a gift in favour of the children of a previous marriage, contained in a settlement made otherwise in consideration of a marriage not validly solemnized, inasmuch as the good consideration was too much mixed up with the bad, and a gift to a class, if invalid as to any, was invalid as to all. On appeal, however, it was held that the judgment was not necessary for the decision of the case, inasmuch as there was a trust for the settlor till the marriage was solemnized, which meant until a valid marriage was solemnized (g).

Marriage  
with deceased  
wife's sister.

A settlement made previously to and in contemplation of marriage with a deceased wife's sister, such a marriage being absolutely void (though solemnized abroad in a country where such marriages are legal) (h), seems to be on a footing similar to that of any other voluntary settle-

(e) 9 Beav. 570; 11 Beav. 227.

(f) 33 Beav. 61; 10 Jur., N. S.  
5; 32 L. J., Ch. 141.

(g) 32 L. J., Ch. 41.

(h) *Brook v. Brook*, 3 Sm. & Giff.  
481; 9 H. L. C. 193.

ment, and the court will not actively interfere to set it aside at the instance of the settlor (*i*); and it is not the law that the legal personal representative of the settlor is in any better position than the settlor in this respect (*k*).

But when there is a limitation to the settlor until marriage, and he goes through the form of marriage with his deceased wife's sister, there is a trust which can arise only upon an event which can never occur, and the property belongs to the settlor absolutely (*k*).

Where a widower married his deceased wife's sister, such marriage and subsequent cohabitation were not held a sufficient consideration to support a conveyance by the wife's sister of the whole of her property to the widower absolutely (*l*). It was, however, as part of the grounds of the decision, held that the fact of the parties going through the marriage ceremony and living as man and wife together created a fiduciary position between them, so that they were under a partial disqualification from conferring benefits on each other (*m*).

Where leaseholds were conveyed to trustees of a settlement made in consideration of a marriage which was broken off, the woman, a few days after the settlement was executed, marrying another man, the court decreed a re-conveyance, notwithstanding the possibility above referred to that the parties might eventually marry each other, being of opinion that it was a possibility not necessary to be taken into calculation under the circumstances (*n*).

*Thomas v. Brennan.*

Where a legacy is given for a particular purpose, and

Failure of purpose of gift.

(*i*) Per Selborne, L. C. (fol. M. R.), in *Ayerst v. Jenkins*, L. R., 16 Eq. 275; 21 W. R. 878; 29 L. T. 126. See *Howson v. Hancock*, 8 T. R. 575; *Rider v. Kidder*, 10 Ves. 360; *Chapman v. Bradley*, 33 Beav. 61; *Coulson v. Allison*, 2 Giff. 279; 2 D., F. & G. 521; *Gray v. Mathias*, 5 Ves. 286; *Mackleston v. Brown*, 6 Ves. 52; *Birch v. Blagrove*, Ambl. 264. (*k*) Per eundem, *ibid.*, not following a dictum of the Lords Com-

missioners in *Matthew v. Hanbury*, 2 Vern. 187.

(*l*) *Coulson v. Allison*, 2 De G., F. & G. 521.

(*m*) *Ibid.*

(*n*) *Thomas v. Brennan*, 25 L. J., Ch. 420. In this case the intending husband had recovered 250*l.* from the lady for breach of promise to marry. And cf. *Essery v. Cowlard*, 32 W. R. 518; L. R., 26 C. D. 191.

the purpose fails without the fault of the legatee, it is a question of the intention of the testator whether the legacy is or is not to take effect. In an early case it was held that if a legacy were given for the benefit of an infant in one way and it could not be so applied, it might be applied for his benefit in another way; for instance, if it were given to him to place him in holy orders and he became a lunatic (*o*). And in another case a legatee was held entitled to a sum of 100*l.* left to him as an apprentice fee, though never apprenticed (*p*).

Where a testator left power to trustees, with consent of the tenant for life, to raise a large sum of money for the advancement of his nephew in the army, it was held, on the abolition of purchase, that the son, with the consent of the tenant for life, was entitled to the sum absolutely (*q*).

Difference in  
deeds and  
wills.

It is to be observed that a majority of these cases have arisen upon wills, and also that a stricter construction is followed in the case of a deed *inter vivos*, and, in a later case, under circumstances very similar to those in *Palmer v. Flower*, the rule therein laid down was not held applicable in a case arising under a settlement. In this case, by a deed a sum of money was directed to be held by trustees upon trust for the settlor's wife for life, and, after her death, for F. W., one of the children of the marriage, who was then an officer in her Majesty's army, and it was declared that it should be lawful for the trustees, if in their discretion they thought fit, to apply any portion of the fund not exceeding 2,000*l.* in or towards effecting the promotion of F. W. in the army: 850*l.* was so supplied, but on the abolition of purchase under Royal Warrant of 20th July, 1871, no further sum could be applied for the same purpose. F. W. claimed the balance of the 2,000*l.* absolutely, and the trustees, so far as they were able, assented; but it was held that it was not an absolute gift

(*o*) *Barlow v. Grant*, 1 Vern. 255.

(*p*) *Barton v. Cooke*, 5 Ves. 461.

(*q*) *Palmer v. Flower*, L. R., 13 Eq. 254; 20 W. R. 174; 41 L. J., Ch. 511; 25 L. T. 816.

but only a discretionary power to advance money for the benefit of F. W. in one particular direction, and that the case was not the case of a will as in *Palmer v. Flower* (r), but of a deed between parties, and that the court must be guided by the express words. And the law having abolished promotion by purchase, the fund could not then be so applied (s).

Where the trusts of a settlement are exhausted, there may be a resulting trust to the donor of a gift intended for the purposes of the settlement (t).

A difficult question sometimes arises where a provision is made absolutely, but accompanied with an expression of the object for which it is given, and such object fails. Such questions, however, arise more frequently on wills than under settlements, and the point will not be further referred to here. It seems that in the case of a will if a gross sum or fixed income is given, and a fixed purpose assigned for the gift, the Court regards the gift nevertheless as absolute, and the expressed purpose merely as an expression of the motive of the donor (u). Thus, in *Barlow v. Grant* (x), where the sum of 30*l.* was given by will to an infant to bind him apprentice, and he died, nevertheless his executor was held entitled (y).

(r) *Ubi sup.* The subject was brought into prominence by the abolition of purchase in the army. Any change of law which effectually prevented the purchase of livings in the church would give further importance to the subject, provisions in that behalf being, it is believed, very frequent.

(s) *In re Ward's Trusts*, L.R., 7 Ch. 727; 42 L.J., Ch. 4; 27 L.T. 668; 20 W.R. 1024. See also *Lecke v. Lord Kilmorey*, Ir. R. 207; *Cowper v. Mantell*, 22 Beav. 231; *Robinson v. Cleator*, 15 Ves. 525; *Cope v. Wilmot*, 1 Col. 396 (n.).

(t) *In re Nash's Settlement*, 51 L.J., Ch. 511; 46 L.T. 97; 30 W.R. 406.

(u) Per Lord Hatherley (then Wood, V.-C.) in *Re Sanderson's Trusts*, 3 K. & J. 497.

(x) *Barlow v. Grant*, 1 Vern. 255. This case is expressly recognised in *Cowper v. Mantell* (No. 2), 22 Beav. 231.

(y) And see *Cope v. Wilmot*, 1 Coll. 396 (n.); *Nevill v. Nevill*, 2 Vern. 431; *Noel v. Jones*, 16 Sim. 309; *Roper on Legacies*, 4th ed. p. 646.

## CHAPTER XXXV.

## EFFECT OF DIVORCE ON MARRIAGE SETTLEMENTS.

UNDER the Divorce Acts, marriage settlements, whether ante-nuptial or post-nuptial, may be remodelled by the court. It was formerly held, though this, as will be seen, has been remedied by legislation, that settlements could only be so dealt with in cases where there had been children of the marriage. This doctrine, together with the doctrine once entertained, but since declared erroneous, that a dissolution of marriage caused a forfeiture of the interest under a marriage settlement of, at all events, the guilty party, led to suits being brought in equity to have marriage settlements set aside in cases where there was a final decree for dissolution or nullity of marriage.

*Fussell v.  
Dowding.*

Thus, where by a marriage settlement property of the wife was given to trustees upon usual trusts, with a trust, if there should be no issue, in favour of the wife absolutely in case she survived the husband, but otherwise in trust for her next of kin, it was held, there being no issue, and the marriage being dissolved on the wife's petition, that the money belonged absolutely to her, though her husband was still living (a).

Settlements  
may be varied  
on dissolution  
of marriage,

However, in *Fitzgerald v. Chapman* (b), it was held that the husband's rights were not forfeited by the dissolution of marriage; and in *Burton v. Sturgeon* (c), James, L. J.,

(a) Per Romilly, M. R., in *Fussell v. Dowding*, L. R., 14 Eq. 421; 41 L. J., Ch. 716; 27 L. T. 406; 2 W. R. 881, following *Jessop v. Blake*, 3 Giff. 639; and *Swift v. Wenman*, L. R., 10 Eq. 15; 39 L. J., Ch. 336; 2 L. T. 194; 18 W. R. 480. And see *Wilkinson v. Gibson*, L. R., 4 Eq. 162; 15 W. R. 983; 16 L. T. 733; 36 L. J.,

Ch. 646; and *Wells v. Malbon*, 31 Beav. 48.

(b) L. R., 1 C. D. 563; 45 L. J., Ch. 23; 33 L. T. 587; 24 W. R. 130, not following *Jessop v. Blake*, *Swift v. Wenman*, and *Fussell v. Dowding*, *ubi sup.*

(c) L. R., 2 C. D. 318; 45 L. J., Ch. 633; 34 L. T. 587; 24 W. R. 130.

held that there was no jurisdiction in the court to punish guilt by causing the interest of the guilty party (in that case the husband) to be forfeited, and that a bill by the wife impeaching the marriage settlement (there being no issue) after dissolution, had been properly dismissed (*d*). By the 22 & 23 Vict. c. 61 (*e*), it is enacted as follows: "The court, after a final decree of nullity of marriage, or dissolution of marriage, may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled, either for the benefit of the children of the marriage or of their respective parents, as to the court shall seem fit."

This statute was by a somewhat narrow construction held to be restricted to cases where there was issue of the marriage; and it was, indeed, held that the court had no power to deal with settlements under the act unless there were issue of the marriage living at the date of the order, even though there had been such issue living at the date of the decree of dissolution (*f*).

By the Matrimonial Causes Act, 1878 (*g*), the court may exercise the powers vested in it by the 22 & 23 Vict. c. 61 (*h*), although there are no children of the marriage, and the operation of this act appears to be retrospective (*i*).

even if there  
are no  
children.

All deeds, including ordinary separation deeds, whereby property is settled upon a woman in her character of wife, and to be paid to her while she continues a wife, come within the 22 & 23 Vict. c. 61, s. 5 (*k*).

(*d*) *Mellish and Baggallay*, L.JJ. concurred.

(*e*) Sect. 5.

(*f*) *Graham v. Graham*, L. R., 1 P. & M. 711; 20 L. T., N. S. 500; 17 W. R. 628; following *Corrance v. Corrance*, L. R., 1 P. & M. 495; 37 L. J., Mat. 44; 16 W. R. 393; 18 L. T., N. S. 535; *Thomas v. Thomas*, 2 Sw. & Tr. 89, and *Bird v. Bird*, L. R., 1 P. & M. 231.

(*g*) 41 & 42 Vict. c. 19, s. 3.

(*h*) Sect. 5.

(*i*) *Ansdell v. Ansdell*, L. R., 5 P. D. 138; 28 W. R. 832; 49 L. J., P. D. & A. 57. But see *Yglesias v. Yglesias*, L. R., 4 P. D. 71; 40 L. T. 37; 27 W. R. 432; and, as to accrued dividends, *Paul v. Paul*, L. R., 2 P. & M. 93; 39 L. J., Mat. 50.

(*k*) *Worsley v. Worsley*, 1 P. & M.



Discretion of  
the judge.

In dealing with settlements under this section, the court will think first of the children (*l*) (if any), and then will deal with the funds in settlement in almost unfettered discretion; and, according to the conduct of the parties, may give the income of the wife to the husband, and *vice versa*, of the husband to the wife. Thus, if the guilty one be the richer, he or she must contribute to the support of the poorer one. If the union has been broken by, and the common home abandoned by, the criminality of one without the fault of the other, the innocent party should not, in addition to the grievous wrong done by the breach of the marriage vow, be wholly deprived of means to the scale of which he or she may have learnt to live (*m*). In deciding these cases, the relative sums contributed by each party, the conduct of each, the total amount of their joint income, the relation it bears to the requirements of the parties, and their respective prospects of increased income, are all elements to be considered (*n*).

The court will not interfere where there is a discretionary trust to pay income to one of the parties (*o*). And the court has not power to vary a marriage settlement by depriving an infant child of the marriage of any interest secured by such settlement (*p*).

Variation not  
made for  
benefit of  
strangers.

The court has only power to vary settlements if it be "for the benefit of the children of the marriage or of their respective parents," and cannot relieve the parent of a petitioner who had covenanted to pay an annuity to a wife who had misconducted herself if she survive her husband and children (*q*); but it may relieve one of the parties from a covenant to appoint in favour of the

648; 38 L. J., Mat. 43; 12 W. R. 743; 20 L. T. 546.

(*l*) *Paul v. Paul*, L. R., 2 P. & M. 93; 39 L. J., Mat. 50; 23 L. T. 196; 18 W. R. 1007.

(*m*) *March v. March*, L. R., 1 P. & M. 440.

(*n*) *Ibid.*

(*o*) *Milne v. Milne*, 2 P. & M. 295.

(*p*) *Crisp v. Crisp*, 2 P. & M. 426; 42 L. J., Mat. 13; 27 L. T. 428; 21 W. R. 79.

(*q*) *Sykes v. Sykes*, L. R., 2 P. & M. 163; 39 L. J., Mat. 52; 23 L. T. 239; 18 W. R. 984.

other (r). The court has no power to vary the provisions in a settlement for the appointment of new trustees (s).

The judges have an absolute judicial discretion as to the provisions to be made for the parties respectively out of settled property, and the Court of Appeal will not interfere unless there has been a clear miscarriage in its "exercise;" but where an order was made depriving a husband of all interest in his wife's property, which was of considerable amount, the order was varied on appeal, so far as to allow payment thereof of debts incurred by the husband for the purposes of the joint establishment (t); and the judge has power in a proper case to review and vary his order as to a settlement (u).

How far  
orders ap-  
pealable.

In *Collis v. Hector* (x), an English marriage settlement was held not affected by a decree of divorce obtained by the husband, a Turk, from the Patriarch of Babylon, as to funds originally belonging to the husband, though the wife's interest would have been destroyed according to the law of Turkey.

(r) *Benyon v. Benyon*, L. R., 1 P. D. 447; 45 L. J., P. 96; 24 W. R. 950.

(s) *Hope v. Hope*, L. R., 3 P. & M. 226; 44 L. J., Mat. 31; 31 L. T. 592; 23 W. R. 110; *Maudslay v. Maudslay*, L. R., 2 P. D. 256; 47 L. J., P. 26; 38 L. T. 323.

(t) *Wigney v. Wigney*, L. R., 7 P. D. 177; 51 L. J., P. 62; 46 L. T. 442; 30 W. R. 722.

(u) *Gladstone v. Gladstone*, L. R., 1 P. D. 442; 45 L. J., P. 82; 45 L. T. 380; 24 W. R. 739.

(x) L. R., 19 Eq. 334; 44 L. J., Ch. 267; 32 L. T. 223; 23 W. R. 486.

## CHAPTER XXXVI.

## POSTHUMOUS CHILDREN.

Child *en ventre sa mère* treated as born.

POSTHUMOUS children are considered for most, if not for all, purposes, as having been born during the lifetime of their deceased father. In *Thellusson v. Woodford* (a), Buller, J., says :—"Such a child has been considered as a nonentity. Let us see what this nonentity can do. He may be vouched in a recovery, though it is for the purpose of making him answer over in value. He may be an executor. He may take under the Statute of Distributions. He may be entitled to a charge for raising portions. He may have an injunction." Some other cases put this beyond doubt. In *Wallis v. Hudson* (b), Lord Hardwicke says :—"The principal reason I go upon in the question is, that the plaintiff was *en ventre sa mère* at the time of her brother's death, and consequently a person *in rerum naturâ*, so that both by the rules of the common and civil law she was to all intents and purposes a child as much as if born in the father's lifetime. In the same case, Lord Hardwicke takes notice that the civil law confines the rule to cases where it is for the benefit of the child to be considered as born; but, notwithstanding, he states the rule to be, that such child is to be considered living to all intents and purposes" (c).

Contingent remainder.

By early decisions, the doctrine that a remainder should vest at the very instant of the determination of the particular estate preceding it at furthest, was extended so as to admit the case of an unborn posthumous child. However,

(a) 4 Ves. 227, 322.

(b) 2 Atk. 117.

(c) But the universality of the proposition probably requires some modification. In the case above cited it was strongly argued (and not decided to the contrary) that a

child *en ventre sa mère* would not be considered born in cases where it was to its prejudice; and it will be further seen that a child *en ventre sa mère* is not in all cases entitled to an account of rents previous to birth.

in *Reeve v. Long* (*d*), in the House of Lords, it was decided otherwise upon limitation created by will. To remove all doubts, recourse was had to legislation, and by a statute of William the Third (*e*), it was enacted to the effect that posthumous children should take contingent remainders in the same manner as if born in their father's lifetime.

Notwithstanding that by the preamble to that act there appeared implied some intention to the contrary, yet, inasmuch as the enacting words extend to take in the case, it seems that a posthumous child is entitled to the intermediate profits of land settled as well as to the lands themselves, and the profits thereof received in the interval before the birth of the child by any person must be accounted for to the child when born (*f*).

Difference as to descended and settled realty.

If the real estate descended, however, to the posthumous child, the profits need be accounted for only from the birth of the child (*g*).

The person receiving the rents in the interval, and entitled, in the event of no posthumous child being born, is sometimes termed the "qualified" heir (*h*).

It has always been considered, in the case of descended estates, that the posthumous heir could have no account for intermediate rents actually received by the "qualified heir" previously to the child's birth (*i*); but it was doubted whether the intermediate income, if not actually received by him, could be recovered by him or not. However, it appears from the registrar's book that the decree in *Bassett v. Bassett* (*k*) was not, as the report infers, a declaration merely that the posthumous child was not entitled to an account of the descended land, but a declaration that

*Bassett v. Bassett.*

(*d*) 1 Salk. 227, cited in Co. Litt. 298 a, note (3) (Mr. Butler's note).

(*e*) 10 Will. 3, c. 22 (in some editions c. 16).

(*f*) Per Lord Hardwicke in *Bassett v. Bassett*, 3 Atk. p. 205.

(*g*) *Ibid.*

(*h*) Per Lord Hatherley (then Wood, V.-C.) in *Richardson v.*

*Richardson*, Johns. 754.

(*i*) Watkins on Descents, p. 585, and Year Book, 9 Hen. 6, there cited; *Goodtitle v. Newman*, 3 Wils. 516. See *contra*, *Goodall v. Gawthorne*, 2 Sm. & Giff. 375.

(*k*) *Ubi sup.*; *Richardson v. Richardson*, *ubi sup.* p. 760.

the rents and profits of the settled estates belonged to him from the time of his father's death, and that the rents and profits of the descended land belong to him from birth only (*k*).

In case of descended land, the qualified heir is entitled to all he receives, and is not a trustee thereof for the posthumous infant, who is therefore not in this respect, as is sometimes with too great generality said (*l*), considered to have been born for all purposes which are for his benefit (*m*).

Indeed, it appears that the tenants owe a duty to the qualified owner (*n*), and the now clearly ascertained rule is, that the posthumous heir is entitled to rents of descended real estate only from the date of his birth, whether the prior rents have been already received by the qualified heir or no, and an estate which, by virtue of a settlement, devolves on a posthumous heir as tenant in tail by descent, is not a settled estate for the purposes of this question (*o*).

(*k*) See note (*k*), *sup.*

(*l*) 2 H. Bl. 399.

(*m*) *Richardson v. Richardson*, *ubi sup.* p. 764.

(*n*) *Richardson v. Richardson*, *ubi sup.*

(*o*) *Ibid.*

## CHAPTER XXXVII.

## MISCELLANEOUS.

By Lord Cranworth's Act (*a*), very convenient powers in regard to the appointment of new trustees were given generally, so as to render unnecessary the repetition in each settlement of the usual powers in that behalf. The statutory power was, however, generally considered insufficient, in so far as it did not provide that on an appointment the number of trustees might ever be reduced, or for the case of a trustee being absent from the United Kingdom; and it was also generally (as was anticipated by the act) desired to nominate some person to make the appointment. In these particulars it was, therefore, necessary (if the act were taken advantage of at all) to supplement the statutory provisions by further provisions (*b*).

Appointment  
of new trustees.

Now, by the Conveyancing Act, 1881 (*c*), larger powers have been given, and they may generally be relied upon as sufficient, with the addition only (if it be desired) of the nomination of a person to make the appointment (*d*); and, by the same act, on an appointment of new trustees, the trust property (except mortgages, stock, &c.) is to vest in the new trustees by simple declaration of the appointor only (*e*); and where there are more than two trustees, in certain circumstances one may retire without a further appointment (*f*).

A trustee of a settlement cannot retire as a matter of course except by the consent of all the beneficiaries, except under a special power in the instrument creating the trust,

Retirement of  
trustees.

(*a*) 23 & 24 Vict. c. 145, s. 27.

23 & 24 Vict. c. 145, ss. 11 to 30.

(*b*) Dav. Prec. vol. 3, pt. 2, p. 721; Prideaux, Prec. vol. 2, p. 193.

(*d*) 44 & 45 Vict. c. 41, s. 31, sub-s. 3.

(*e*) *Ibid.* s. 34.

(*c*) 44 & 45 Vict. c. 41, repealing

(*f*) *Ibid.* s. 32.

or by an order of some competent court (*g*); and he must find some person willing to take his place (*h*).

Settlements of real estate should contain a covenant for title by the settlor with the trustees and their assigns, otherwise objections may be taken by a purchaser under the power of sale, that he has not the advantage of the usual chain of covenants for title, as the trustees will only covenant against their own incumbrances, and it is possible that such an objection might be sustained, and the power of sale thereby rendered ineffectual (*i*).

Severing  
trust.

It was often thought doubtful how far it was lawful and proper to divide up a trust by appointing different sets of trustees for different parts of the trust estate. However, trusts were allowed by the court to be executed "piece-meal" in a case where the persons entitled to the legal estate in the whole premises consented, and new trustees were appointed of a will so far as it related to a certain annuity only (*k*); and in another case under the Trustee Act, 1850, a person was appointed a trustee of a part only of a trust property for the purpose of transferring it into court, though it was intimated that a trustee could not usually be appointed for a limited purpose only (*l*).

Now, however, by the Conveyancing Act, 1882 (*m*), on appointment of new trustees, the trust estate may be severed, and a separate set of trustees, or, in certain cases, a single trustee, may be appointed for a part of the trust estate held upon distinct trusts (*n*).

Right to re-  
lease.

On the final distribution of a trust fund, it is usual, except in simple cases, for the trustee to require and receive a release under seal from the beneficiaries (*o*).

There is, however, strange as it may appear, an absence

(*g*) Lewin on Trusts, p. 553. (*l*) *In re Hodgson*, L. R., 11 C. D. 88.  
 (*h*) But cf. now the 44 & 45 Vict. c. 41, ss. 31, 32. (*m*) 45 & 46 Vict. c. 39.  
 (*i*) Dart, V. & P., 5th ed. vol. 1, p. 545, and cases there cited. (*n*) Sect. 5 (retrospective).  
 (*k*) *In re Dennis's Trusts*, 12 W. R. 575. (*o*) Prideaux, Conv., 11th ed. p. 595.

of authority whether a release can be insisted on as of right, as there are *dicta* of the judges on both sides (*p*).

In *Re Cater's Trusts* (*q*), it was held that trustees upon transferring funds not directly to the persons entitled, but to trustees for them, were not entitled to a release from such trustees; but, *semble*, that they were so from the beneficiaries themselves.

Trustees on winding up an estate are, however, entitled to an acknowledgment in writing, not under seal, that the final payment has been received in full discharge of all sums due under the settlement, and they are entitled to retain a substantial sum in hand to meet possible litigation until they receive such an acknowledgment (*r*).

A compromise by way of family arrangement of disputed rights will be supported by the courts, and is in itself a sufficient consideration without a pecuniary consideration (*s*); and the validity of such a compromise of disputed rights depends on the facts existing at the date thereof, and will not be affected by subsequent events, such as a later judicial determination showing that the rights of the parties were other than had been supposed, and that one party had nothing to give up (*t*).

A settlement of personal property made according to English law may be valid as to property in England, although invalid by the law of the country where the parties are domiciled. Thus, where a settlement executed by intending husband and wife, the former being a domiciled Frenchman and the latter intending so to become, was invalid by French law because not executed before a notary (*u*), it was yet held to be valid as to the personal property of the lady in England (*x*).

(*p*) Cf. *Chadwick v. Heatley*, 2 Coll. 137, 142; *Re Wright's Trusts*, 3 K. & J. 421; *Warter v. Anderson*, 11 Ha. 303; *Re Cater's Trusts*, 25 Beav. 366; *King v. Mullins*, 1 Drew. 308.

(*q*) *Ubi sup.*

(*r*) *Chadwick v. Heatley*, *ubi sup.*;

*Cooke v. Keightley* (unreported), before Chitty, J., Lent Term, 1884, where 750*l.* was so retained.

(*s*) *Jodrell v. Jodrell*, 14 Beav. 397.

(*t*) *Lawton v. Campion*, 18 Beav. 87.

(*u*) Cf. Code Nap. Art. 1394.

(*x*) *Van Grutten v. Digby*, 31



## Recitals.

A recital in a trust deed may be conclusive evidence against the trustees, and it has been judicially said that a recital of a transfer of sum of stock to trustees would bind them as much as actual transfer (*y*).

Where the recitals and operative part of a deed conflict, it is probably the better opinion that if the operative part be clear it will not be controlled by the recitals, but that if it be ambiguous it may be explained thereby (*z*).

## Illegitimate children.

Illegitimate children are so rarely intended to be benefited by a marriage settlement, that it is unnecessary to consider here with any particularity how far and by what expressions they may become benefited. It is presumed, however, that if sufficiently designated and already existent, they may take any benefit intended for them; but it must be remembered that the term "children" means, *prima facie*, legitimate children only, unless it is clear that such a meaning could not be intended, and also that it is doubtful how far it is possible lawfully to provide for future illegitimate children (*a*).

## Renewals.

A trustee of leaseholds, and as a rule any person with a limited interest therein, such as a tenant for life, if he renew them, is considered to do so for the benefit of the trust estate. A person in such a position should rather let a lease run out than attempt to renew it for his own benefit, and on public grounds the trustee may be the

Beav. 561; and see case there cited; and cf. *Collis v. Hector*, L. R., 19 Eq. 334; 44 L. J., Ch. 267; 32 L. T. 223; 23 W. R. 485.

(*y*) *Story v. Gape*, 2 Jur., N. S. 706. But see *contra*, per Cranworth, L. C., in *Davis v. Chambers*, 3 Jur., N. S. 297, where it is said that such recital is only strong *prima facie* evidence.

(*z*) See on the subject (amongst other cases) *Jenner v. Jenner*, L. R., 1 Eq. 361; 12 Jur. 138; 35 L. J., Ch. 329, and cases there cited.

(*a*) See on the subject, *Ellis v. Houstoun*, L. R., 10 C. D. 236; 27 W. R. 501; *Laker v. Hordern*, L. R., 1 C. D. 644; 45 L. J., Ch. 315;

34 L. T. 88; 24 W. R. 543; *In re Ayles' Trusts*, L. R., 1 C. D. 282; *Dorin v. Dorin*, L. R., 17 Eq. 463; 7 H. L. 568; 31 L. T. 281; 23 W. R. 570; *In re Goodwin's Trusts*, L. R., 17 Eq. 345; 43 L. J., Ch. 258; 22 W. R. 619; *Occleston v. Fullalove*, L. R., 9 Ch. 147; 43 L. J., Ch. 147; 29 L. T. 780; 22 W. R. 305; *Hill v. Crook*, L. R., 6 H. L. 265; 42 L. J., Ch. 702; 22 W. R. 137; *Pratt v. Mathew*, 22 Beav. 328; *Howarth v. Mills*, L. R., 2 Eq. 389; 14 L. T. 544; *Holt v. Sindrey*, L. R., 7 Eq. 170; *Meltham v. Devon*, 1 P. W. 529; *Blodwell v. Edwards*, Cro. Eliz. 509.

only person of all mankind who may not have the lease (*b*), and it makes no difference that the lease has been refused to be renewed to the beneficiary (*c*).

The principle of equity as to renewals appears to extend to cases where there is no actual right to renew, if there is a species of tenant-right or goodwill, as in the case of leases from colleges and ecclesiastical bodies, or even perhaps in the case of very old tenants (*d*).

Where a person with a limited interest renews for the benefit of the estate and finds the whole money, difficult questions sometimes arise as to the ultimate incidence of the payment. Where a tenant for life pays for the renewal he is entitled to compensation from the remaindermen (in the absence of special provision) in the inverse proportion to the amount of his own enjoyment; and the amount to be paid by the remaindermen, in respect of the fines and expenses of renewal, must be ascertained by reference to the actual enjoyment of the tenant for life, with compound interest up to the death of the tenant for life, and simple interest afterwards (*e*).

A rough rule of thumb once existed that in such cases the tenant for life should pay one-third and the remaindermen two-thirds, a rule which sometimes may have failed to work complete justice, but which saved considerable difficulty in adjustment.

Express provision is sometimes made in the settlement for payment of such charges by sale, or by mortgage, or out of the income of the estate. In the first case the tenant for life loses the income of the part sold; in the second, he keeps down the interest on the mortgage; in the third, he bears the whole burthen of the expense (*f*).

(*b*) Per King, L. C., in *Keech v. Sandford*, White & Tudor, L. C., vol. 1.

(*c*) *Ibid*.

(*d*) See *Pickering v. Vowles*, 1 Bro. C. C. 197; *Edwards v. Lewis*, 3 Atk. 538.

(*e*) *Bradford v. Brownjohn*, L. R., 3 Ch. 711; 16 W. R. 500, 1178; 37 L. J., Ch. 198; 18 L. T. 388;

*Nightingale v. Lawson*, 1 Bro. C. C. 440. And see *White v. White*, 9 Ves. 554; *Giddings v. Giddings*, 3 Russ. 241; *Hudleston v. Whelpdale*, 9 Ha. 775; *Jones v. Jones*, 5 Ha. 440. And see *Isaac v. Wall*, L. R., 6 C. D. 706.

(*f*) *Bradford v. Brownjohn*, *ubi sup.*; *Ainslie v. Harcourt*, 28 Beav. 313; *Solley v. Wood*, 29 Beav. 482.

Where there is an alternative trust it is doubtful how far a trustee may safely exercise the discretion so as to throw the burden on the tenant for life as against the remaindermen, and *vice versa* (g).

It is to be observed that there may be a difference whether the expression is "annual" rents and profits, or "rents and profits" simply, the use of the latter form being sometimes considered as equivalent to a direction for payment out of the *corpus* (h), though the natural meaning of the words is annual income (i).

When a special fund is set apart to pay for renewals, and renewal becomes impossible, difficult questions may arise as to what is to become of the fund (k).

Under the 23 & 24 Vict. c. 145 (l), there are special statutory provisions authorizing, and in certain cases obliging trustees to renew and raise the expenses out of the *corpus* of the estate (m).

Renewals of leaseholds are becoming less frequent, but the rules of equity applicable to payments made in respect thereof are for the most part applicable by analogy to any payments made for the benefit of the estate by any persons with limited interests.

Costs of  
settlement.

In the case of a settlement of personal property the practice is for the solicitor of the lady to prepare the settlement, whether the property come from the husband or wife, or from both, and for the husband to pay for it: and a solicitor acting in the preparation of the settlement may claim payment from the husband, though employed and retained by the intending wife or her parents; usage

(g) Lewin on Trusts, 7th ed. p. 335.

(h) *In re Barber's Settled Estate*, L. R., 18 C. D. 629; 50 L. J., Ch. 769; 45 L. T. 433; 29 W. R. 909.

(i) Per Lord Hardwicke, L. C., in *Ivy v. Gilbert*, 2 P. W. 13; and see *Allen v. Packhouse*, 2 V. & B. 65.

(k) *Morris v. Hodges*, 27 Beav. 625; *Tardiff v. Robinson*, *ibid.* 629.

(n); *In re Money's Trusts*, 2 Dr. & Sm. 94. As to effect of leaseholds

renewable by practice being taken by a railway company, see *In re Wood's Estate*, L. R., 10 Eq. 522; 19 W. R. 59; 40 L. J., Ch. 179; 23 L. T. 430. See *Maddy v. Hale*, L. R., 3 C. D. 327; and *In re Barber's Settled Estates*, *ubi sup.*

(l) Sect. 8.

(m) And as to ecclesiastical leases, see 23 & 24 Vict. c. 124, s. 20.

in such cases making the husband liable to indemnify any one who, on the part of his wife, has properly incurred liability by retaining the solicitor (*n*).

Where the lady was an infant residing with, and forming part of, the family of her father, and the instructions were given by the father, under circumstances where a jury would hold that they were given by him as her agent, it was held that she and her husband were liable to be jointly sued as for a debt contracted by her for necessaries before her marriage (*o*).

It may be added that marriage settlements are specially excluded from the operation of the Bills of Sale Act, 1878, and the Bills of Sale Amendment Act, 1882 (*p*), but that post-nuptial settlements not in pursuance of ante-nuptial articles would fall within the acts (*q*).

Under the Stamp Act, 1870 (*r*), a heavy ad valorem duty is imposed on settlements (*s*).

(*n*) *Helps v. Clayton*, 17 C. B., N. S. 553. It is probable that usually the same rule will apply as to settlements of realty except under special circumstances.

(*o*) *Helps v. Clayton*, *ubi sup.* And *quære* as to how far (if at all) the practice will now vary since recent legislation conferring further rights and obligations on married women.

(*p*) See 41 & 42 Vict. c. 31, s. 4; and 45 & 46 Vict. c. 43, s. 3.

(*q*) *Baldwin on Bankruptcy*, p. 19; *Fowler v. Foster*, 28 L. J., Q. B. 210; 5 Jur., N. S. 99.

(*r*) 33 & 34 Vict. c. 97.

(*s*) By sects. 124–126, it is enacted as follows:—

“Where any money which may become due or payable upon any policy of insurance, or upon any security, not being a marketable security, is settled or agreed to be settled, the instrument whereby such settlement is made or agreed to be made is to be charged with ad valorem duty in respect of such money.

“Provided as follows:

“(1) Where, in the case of a

policy of insurance, no provision is made for keeping up the policy, the ad valorem duty is to be charged only on the value of the policy at the date of the instrument.

“(2) If in any such case the instrument contains a statement of such value, and is stamped in accordance with such statement, it is, so far as regards such policy, to be deemed duly stamped, unless or until it is shown that such statement is untrue, and that the instrument is in fact insufficiently stamped.

“125. (1) An instrument chargeable with ad valorem duty as a settlement in respect of any money, stock or security, is not to be charged with any further duty by reason of containing provision for the payment or transfer of the same money, stock or security.

“(2) Where any money, stock or security is settled, or agreed to be settled, by a person who has only a reversionary interest therein, and the instrument whereby such settlement is made, or agreed to be made, contains a covenant by the person entitled in possession to the

interest or dividends of such money, stock or security for the payment, during the continuance of such possession, of any annuity or yearly sum not exceeding interest at the rate of 4l. per cent. per annum upon the amount or value of such money, stock or security, such instrument shall not be charged with any duty in respect of such covenant.

"126. (1) Where several instruments are executed for effecting the settlement of the same property, and the ad valorem duty chargeable in respect of the settlement of such property exceeds 10s., one only of such instruments is to be charged with the ad valorem duty.

"(2) Where a settlement is made in pursuance of any previous agreement, or articles upon which any ad valorem settlement duty exceeding 10s. has been paid in respect of the same property, such settlement is not to be charged with any ad valorem settlement duty.

"(3) In each of the aforesaid cases, the instruments not chargeable with ad valorem duty are to be charged with a duty of ten shillings."

And the schedule to the same act, under the head Settlement, is as follows:

"SETTLEMENT.—Any instrument whether voluntary or upon any good or valuable consideration other than a bona fide pecuniary consideration, whereby any definite and certain principal sum of money (whether charged or chargeable on lands or other hereditaments or heritable subjects or not, or to be laid out in the purchase of lands or other hereditaments or heritable subjects or not), or any definite and certain amount of stock or any security is settled or agreed to be settled in any manner whatsoever:

"For every 100l., and also for any fractional part of 100l., of the amount or value of the property settled or agreed to be settled ..... 5s.

"*Exemption.*

"Instrument of appointment relating to any property in favour of persons specially named or described as the objects of a power of appointment created by a previous settlement stamped with ad valorem duty in respect of the same property, or by will, where probate duty has been paid in respect of the same property as personal estate of the testator."

## APPENDIX OF STATUTES.

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13 ELIZ. C. 5.

FOR avoiding and abolishing of feigned, covenous and fraudulent 13 Eliz. c. 5.  
feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, as well as of lands and tenements, as of goods and chattels, more commonly used and practised in these days than hath been seen or heard of heretofore, which feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions, have been, and are devised and contrived of malice, fraud, covin, collusion, or guile, to the end, purpose, and intent, to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs, not only to the let or hindrance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing, bargaining and chevisance between man and man without the which no commonwealth or civil society can be maintained or continued :

2. Be it therefore declared, ordained and enacted by the authority of this present parliament, that all and every feoffment gift grant alienation bargain and conveyance of lands tenements hereditaments goods and chattels or any of them or of any lease rent common or other profit or charge out of the same lands tenements and hereditaments goods and chattels or any of them by writing or otherwise and all and every bond suit judgment and execution at any time had or made sithence the beginning of the Queens Majestys reign that now is or at any time hereafter to be had or made to or for any intent or purpose before declared and expressed shall be from henceforth deemed and taken (only as against that person or persons his or their heirs successors executors administrators and assigns and every of them whose actions suits debts accounts damages penalties forfeitures heriots mortuaries and reliefs by such guileful covenous or fraudulent devices and practices as aforesaid are shall or might be in any ways disturbed hindered delayed or defrauded) to be clearly and utterly void frustrate and of none effect; any pretence colour feigned consideration expressing of use or any other matter or thing to the contrary notwithstanding.

3. And be it further enacted by the authority aforesaid that all and every the parties to such feigned covinous or fraudulent feoffment gift grant alienation bargain conveyance bonds suits judgments executions and other things before expressed and being privy and knowing of the same or any of them; which at any time after the tenth day of June next coming shall wittingly and willingly put in ure avow maintain justify or defend the same or any of them as true simple and done had or made bonâ fide and upon good consideration; or shall alien or assign any the lands tenements goods leases or other things before mentioned to him or them conveyed as is aforesaid or any part thereof shall incur the penalty and forfeiture of one years value of the said lands tenements and hereditaments leases rents commons or other profits of or out of the same; and the whole value of the said goods and chattels and also so much money as are or shall be contained in any such covinous and feigned bond; the one moiety whereof to be to the Queens Majesty her heirs and successors and the other moiety to the party or parties grieved by such feigned and fraudulent feoffment gift grant alienation bargain conveyance bonds suits judgments executions leases rents commons profits charges and other things aforesaid to be recovered in any of the Queens courts of record by action of debt bill plaint or information wherein no essoin protection or wager of law shall be admitted for the defendant or defendants; and also being thereof lawfully convicted shall suffer imprisonment for one half year without bail or mainprise.

4. Provided always and be it further enacted by the authority aforesaid that whereas sundry common recoveries of lands tenements and hereditaments have heretofore been had and hereafter may be had against tenant in tail or other tenant of the freehold the reversion or remainder or the right of reversion or remainder then being in any other person or persons; that every such common recovery heretofore had and hereafter to be had of any lands tenements or hereditaments shall as touching such person and persons which then had any remainder or reversion or right of remainder and reversion and against the heirs of every of them stand remain and be of such like force and effect and of none other, as the same should have been if this act had never been remade.

5. Provided always and be it further enacted by the authority aforesaid that this act or any thing therein contained shall not extend to make void any estate or conveyance by reason whereof any person or persons shall use any voucher in any writ of formedon now depending or hereafter to be depending but that all and every such vouchers in any writ of formedon shall stand and

be in like force and effect as if this act had never been had ne made; anything before in this act contained to the contrary notwithstanding.

6. Provided also and be it enacted by the authority aforesaid that this act or anything therein contained shall not extend to any estate or interest in lands tenements hereditaments leases rents commons profits goods or chattels had made conveyed or assured or hereafter to be had made conveyed or assured which estate or interest is or shall be upon good consideration and bona fide lawfully conveyed or assured to any person or persons or bodies politick or corporate not having at the time of such conveyance or assurance to them made any manner of notice or knowledge of such covin fraud or collusion as is aforesaid; anything before mentioned to the contrary hereof notwithstanding.

7. This act to endure until the end of the first session of the next parliament. [Made perpetual by 29 Eliz. c. 5. See 27 Eliz. c. 4.]

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27 ELIZ. c. 4.

FORASMUCH as not onely the Queenes most excellent Majestie, 27 ELIZ. c. 4. but also divers of her Highnes good and lovinge subjects and bodies politique and corporate, after conveyances obtained or to be obtained and purchases made or to be made of landes tenementes leases estates and hereditamentes for money or other good considerations may have incurre and receive great losse and prejudice, by reason of fraudulent and covenous conveyances estates giftes grantes charges and limitations of uses, heretofore made or hereafter to be made of in or out of lands tenementes or hereditaments so purchased or to be purchased; which said giftes grauntes charges estates uses and conveyances were or hereafter shall be meant or intended, by the parties that so make the same, to be fraudulent and covenous of purpose and entent to deceive such as have purchased or shall purchase the same, or els by the secret entent of the parties, the same be to their owne proper use and at their fre disposition coloured neverthelesse by a fained countenance and shewe of woordes and sentences as though the same were made bona fide for good causes and upon just and lawfull considerations: for remidy of which inconveniences, and for the avoyding of such fraudulent fayned and covenous conveyances giftes grantes charges uses and estates, and for the maintenance of upright and just dealing in the purchasing of landes tenementes and hereditaments be it ordeined and enacted by the authoritie of



this present Parliament that all and everie conveyance graunt charge lease estate incombrance and limitation of use or uses of in or out of any landes tenements or other hereditaments whatsoever, had or made any time heretofore sithence the beginninge of the Queenes Majesties raigne that nowe is, or at any time hereafter to be had or made, for the intent and of purpose to defraude and deceive such person or persons bodies pollitique or corporate as have purchased or shall afterwards purchase in fe simple fe tail for life lives or yeres the same landes tenementes and hereditamentes or any part or percell thereof, so formerly cōveid graunted leased charged incumbred or limitted in use, or to defraude and deceive such as have or shall purchase any rent profite or commoditie in or out of the same, or any parte thereof, shall be deemed and taken only as against that person and persons bodies pollitique and corporate or his heirs successors executors administrators and assignes and against all and everi other person and persons lawfully having or claiming by from or under any of them which have purchased or shall hereafter so purchase for money or other good consideration the same landes tenements or hereditaments or other part or percell thereof, or any rent, profet or comoditie in or out of the same, to be utterly voide frustrate and of none effecte; any pretence, colour, fained consideration, or expressing of any use or uses, to the contrari notwithstanding.

And be it foorthier inacted by the authoritie aforesaide, that all and everie the parties to such fained covenous and fraudulent giftes grantes leases charges or conveyances before expressed, or beinge privie and knowing of the same or any of them, which after the XX day of Aprill next cominge shall wittingely and willingly put in ure avow maintaine justifie or defend the same or any of them as true simple done had or made bona fide or upon good consideration to the disturbance or hindrance of the said purchaser or purchasers (leasses or grauntes) or of or to the hinderance or disturbance of their heirs successors executors administrators or assignes or such as have or shall lawfully claim anything by from or under them or any of them shall incurre the penaltie or forfeiture of one yeres value of the said landes tenementes and hereditaments so purchased or charged; the one moietie whereof to be to the Queenes Majestie her heirs or successors and the other moietie to the partie or parties greved by such fained and fraudulent gift graunt lease conveyance incumbrance or limitation of use; to be recovered in any of the Queenes courtes of record by action of debt bill plaint or information, wherein no essoine protection or wager of lawe shall be admitted for the defendant or defendants; and also being thereof lawfully convicted

shall suffer imprisonment for one halfe yere without baile or mainprise.

Provided also and be it enacted by the authoritie aforesaid, that this Acte or anything therein contained shall not extend or be construed to impeach defait make void or frustrate any conveyance or assignement of lease assurance graunt charge lease estate interest or limitation of use or uses, of in to or out of any landes tenementes or hereditaments, heretofore at any time hade or made or hereafter to be hade or made, upon or for good consideration and bona fide, to any person or persons bodies pollitique or corporate; any thinge before mentionede to the contrary heereof notwithstandinge.

And be it further enacted by the authoritie aforesaide, that if any person or persons have heretofore sithens the beginning of the Queenes Majesties raigne that nowe is, made, or hereafter shall make, any conveyance gift graunt demise charge limitation of use or uses or assurance of in or out of any landes tenementes or hereditamentes, with ani clause provision article or condition of revocation determination or alteration at his or their will or pleasure of such conveyances assurance grauntes limitations of uses or estates of in or out of the said landes tenementes or hereditamentes or of in or out of any part or parcell of them, contained or mentioned in any writinge deede or indenture of such assurance conveyance graunte or gifte; and after such conveyance graunte gift demise charge limitation of uses or assurance so made or had, shall or doe bargain sell demise graunt convey or charge the same landes tenementes or hereditamentes, or any part or parcell thereof, to any person or persons bodies pollitique or corporate, for money or other good consideration paid or gevven, the saide first conveyance assurance gift graunt demise charge or limitation not by him or them revoked made voyde or altered, accordinge to the power or authoritie reserved or expressed unto him or them in and by the said secrete conveyance assurance gift or graunt, that then the said former conveyance assurance gift demise and graunte, as touching the said landes tenementes and hereditamentes so after bargained sold conveyed demised or charged, against the said bargaines veendes leases graundeas, and everie of them, their heires successors executors administrators and assignes, and against all and everie person and persons which have shal or may lawfully claime any thing by from or under them or any of them, shall be deemed taken and adjudged to be void frustrate and of none effecte, by vertue and force of this present Acte: Provided neverthelesse that no lawfull mortgage, made or to be made bona fide and without fraud or covin upon good consideration, shall be impeached or impaired by force of this Acte, but shall stande in like force and effecte as the same

shoulde have done if this Acte had never bene had nor made; any thing in this Acte to the contrarie in any wise notwithstanding.

18 & 19 VICT. c. 43 (INFANTS' SETTLEMENT ACT).

18 & 19 Vict.  
c. 43.

"It shall be lawful for every infant, upon or in contemplation of his or her marriage, with the sanction of the Court of Chancery, to make a valid and binding settlement or contract for a settlement of all or any part of his or her property, or property over which he or she has any power of appointment, whether real or personal, and whether in possession, reversion, remainder or expectancy; and every conveyance, appointment and assignment of such real or personal estate, or contract to make a conveyance, appointment or assignment thereof, executed by such infant with the approbation of the said Court, for the purpose of giving effect to such settlement, shall be as valid and effectual as if the person executing the same were of the full age of twenty-one years: Provided always, that this enactment shall not extend to powers of which it is expressly declared that they shall not be exercised by an infant.

"Provided always, that in case any appointment under a power of appointment, or any disentailing assurance, shall have been executed by any infant tenant in tail under the provisions of this Act, and such infant shall afterwards die under age, such appointment or disentailing assurance shall thereupon become absolutely void.

"The sanction of the Court of Chancery to any such settlement or contract for a settlement may be given upon petition presented by the infant or his or her guardian in a summary way, without the institution of a suit; and if there be no guardian, the court may require a guardian to be appointed or not, as it shall think fit; and the Court also may, if it shall think fit, require that any persons interested or appearing to be interested in the property should be served with notice of such petition.

"Provided always, that nothing in this Act contained shall apply to any male infant under the age of twenty years, or to any female infant under the age of seventeen years."

Rules of  
Court, 1883.

The Rules of Court provide that upon applications to obtain the sanction of the court to infants making settlements on marriage under the Act of 18 & 19 Vict. c. 43, evidence is to be produced to show—

1. The age of the infant.
2. Whether the infant has any parents or guardians.

3. With whom or under whose care the infant is living, and, if the infant has no parents or guardians, what near relations the infant has.

4. The rank and position in life of the infant and parents.

5. What the infant's property and fortune consist of.

6. The age, rank and position in life of the person to whom the infant is about to be married.

7. What property, fortune and income such person has.

8. The fitness of the proposed trustees, and their consent to act.

The proposals for the settlement of the property of the infant, and of the person to whom such infant is proposed to be married, are to be submitted to the judge.

#### 44 & 45 VICT. c. 41, ss. 30—43.

#### (CONVEYANCING AND LAW OF PROPERTY ACT, 1881.)

##### VI.—*Trust and Mortgage Estates on Death.*

30.—(1.) Where an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, is vested on any trust, or by way of mortgage, in any person solely, the same shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time, in like manner as if the same were a chattel real vesting in them or him; and accordingly all the like powers, for one only of several joint personal representatives, as well as for a single personal representative, and for all the personal representatives together, to dispose of and otherwise deal with the same, shall belong to the deceased's personal representatives or representative from time to time, with all the like incidents, but subject to all the like rights, equities and obligations, as if the same were a chattel real vesting in them or him; and, for the purposes of this section, the personal representatives for the time being of the deceased shall be deemed in law his heirs and assigns, within the meaning of all trusts and powers.

44 & 45 Vict.  
c. 41.  
Devolution of  
trust and  
mortgage  
estates on  
death.

(2.) Section four of the Vendor and Purchaser Act, 1874, and section forty-eight of the Land Transfer Act, 1875, are hereby repealed.

37 & 38 Vict.  
c. 78.  
38 & 39 Vict.  
c. 87.

(3.) This section, including the repeals therein, applies only in cases of death after the commencement of this Act.

##### VII.—*Trustees and Executors.*

31.—(1.) Where a trustee, either original or substituted, and whether appointed by a court or otherwise, is dead, or remains out

Appointment  
of new trus-  
tees, vesting  
of trust pro-  
perty, &c.

of the United Kingdom for more than twelve months, or desires to be discharged from the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated for this purpose by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, may, by writing, appoint another person or other persons to be a trustee or trustees in the place of the trustee dead, remaining out of the United Kingdom, desiring to be discharged, refusing or being unfit, or being incapable, as aforesaid.

(2.) On an appointment of a new trustee, the number of trustees may be increased.

(3.) On an appointment of a new trustee, it shall not be obligatory to appoint more than one new trustee, where only one trustee was originally appointed, or to fill up the original number of trustees, where more than two trustees were originally appointed; but, except where only one trustee was originally appointed, a trustee shall not be discharged under this section from his trust unless there will be at least two trustees to perform the trust.

(4.) On an appointment of a new trustee any assurance or thing requisite for vesting the trust property, or any part thereof, jointly in the persons who are the trustees, shall be executed or done.

(5.) Every new trustee so appointed, as well before as after all the trust property becomes by law, or by assurance, or otherwise, vested in him, shall have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

(6.) The provisions of this section relative to a trustee who is dead include the case of a person nominated trustee in a will but dying before the testator; and those relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this section.

(7.) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.

(8.) This section applies to trusts created either before or after the commencement of this Act.

Retirement of  
trustée.

32.—(1.) Where there are more than two trustees, if one of them by deed declares that he is desirous of being discharged from the trust, and if his co-trustees and such other person, if any, as is empowered to appoint trustees, by deed consent to the discharge

of the trustee, and to the vesting in the co-trustees alone of the trust property, then the trustee desirous of being discharged shall be deemed to have retired from the trust, and shall, by the deed, be discharged therefrom under this Act, without any new trustee being appointed in his place.

(2.) Any assurance or thing requisite for vesting the trust property in the continuing trustees alone shall be executed or done.

(3.) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.

(4.) This section applies to trusts created either before or after the commencement of this Act.

33.—(1.) Every trustee appointed by the Court of Chancery, or by the Chancery Division of the Court, or by any other court of competent jurisdiction, shall, as well before as after the trust property becomes by law, or by assurance, or otherwise, vested in him, have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

Powers of new trustee appointed by court.

(2.) This section applies to appointments made either before or after the commencement of this Act.

34.—(1.) Where a deed by which a new trustee is appointed to perform any trust contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, or the right to recover and receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become and are the trustees for performing the trust, that declaration shall, without any conveyance or assignment, operate to vest in those persons, as joint tenants, and for the purposes of the trust, that estate, interest, or right.

Vesting of trust property in new or continuing trustees.

(2.) Where a deed by which a retiring trustee is discharged under this Act contains such a declaration as is in this section mentioned by the retiring and continuing trustees, and by the other person, if any, empowered to appoint trustees, that declaration shall, without any conveyance or assignment, operate to vest in the continuing trustees alone, as joint tenants, and for the purposes of the trust, the estate, interest, or right to which the declaration relates.

(3.) This section does not extend to any legal estate or interest in copyhold or customary land, or to land conveyed by way of mortgage for securing money subject to the trust, or to any such share, stock, annuity, or property as is only transferable in books kept by a company or other body, or in manner prescribed by or under Act of Parliament.

(4.) For purposes of registration of the deed in any registry, the person or persons making the declaration shall be deemed the conveying party or parties, and the conveyance shall be deemed to be made by him or them under a power conferred by this Act.

(5.) This section applies only to deeds executed after the commencement of this Act.

Power for  
trustees for  
sale to sell by  
auction, &c.

35.—(1.) Where a trust for sale or a power of sale of property is vested in trustees, they may sell or concur with any other person in selling all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to any such conditions respecting title or evidence of title, or other matter, as the trustees think fit, with power to vary any contract for sale, and to buy in at any auction, or to rescind any contract for sale, and to re-sell, without being answerable for any loss.

(2.) This section applies only if and as far as a contrary intention is not expressed in the instrument creating the trust or power, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(3.) This section applies only to a trust or power created by an instrument coming into operation after the commencement of this Act.

Trustees re-  
ceipts.

36.—(1.) The receipt in writing of any trustees or trustee for any money, securities or other personal property or effects payable, transferable or deliverable to them or him under any trust or power shall be a sufficient discharge for the same, and shall effectually exonerate the person paying, transferring or delivering the same from seeing to the application or being answerable for any loss or misapplication thereof.

(2.) This section applies to trusts created either before or after the commencement of this Act.

Power for  
executors and  
trustees to  
compound, &c.

37.—(1.) An executor may pay or allow any debt or claim on any evidence that he thinks sufficient.

(2.) An executor, or two or more trustees acting together, or a sole acting trustee where, by the instrument, if any, creating the trust, a sole trustee is authorized to execute the trusts and powers thereof, may, if and as he or they think fit, accept any composition, or any security, real or personal, for any debt, or for any property, real or personal, claimed, and may allow any time for payment of any debt, and may compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's estate or to the trust, and for any of those purposes may enter into, give, execute and do such agreements, instruments of composition or arrangement, releases and other things as to him or them seem expedient, without being

responsible for any loss occasioned by any act or thing so done by him or them in good faith.

(3.) As regards trustees, this section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(4.) This section applies to executorships and trusts constituted or created either before or after the commencement of this Act.

**38.—(1.)** Where a power or trust is given to or vested in two or more executors or trustees jointly, then, unless the contrary is expressed in the instrument, if any, creating the power or trust, the same may be exercised or performed by the survivor or survivors of them for the time being. Powers to two or more executors or trustees.

(2.) This section applies only to executorships and trusts constituted after or created by instruments coming into operation after the commencement of this Act.

#### VIII.—*Married Women.*

**39.—(1.)** Notwithstanding that a married woman is restrained from anticipation, the court may, if it thinks fit, where it appears to the court to be for her benefit, by judgment or order, with her consent, bind her interest in any property. Power for court to bind interest of married woman.

(2.) This section applies only to judgments or orders made after the commencement of this Act.

**40.—(1.)**—A married woman, whether an infant or not, shall by virtue of this Act have power as if she were unmarried and of full age, by deed, to appoint an attorney on her behalf for the purpose of executing any deed or doing any other act which she might herself execute or do; and the provisions of this Act relating to instruments creating powers of attorney shall apply thereto. Power of attorney of married woman.

(2.) This section applies only to deeds executed after the commencement of this Act.

#### IX.—*Infants.*

**41.** Where a person in his own right seised of or entitled to land for an estate in fee simple, or for any leasehold interest at a rent, is an infant, the land shall be deemed to be a settled estate within the Settled Estates Act, 1877. Sales and leases on behalf of infant owner. 40 & 41 Vict. c. 18.

**42.—(1.)** If and as long as any person who would but for this section be beneficially entitled to the possession of any land is an infant, and being a woman is also unmarried, the trustees appointed for this purpose by the settlement, if any, or if there are none so appointed, then the persons, if any, who are for the time being under the settlement trustees with power of sale of the settled land, or of part thereof, or with power of consent to or approval of Management of land and receipt and application of income during minority.



the exercise of such a power of sale, or if there are none, then any persons appointed as trustees for this purpose by the court, on the application of a guardian or next friend of the infant, may enter into and continue in possession of the land; and in every such case the subsequent provisions of this section shall apply.

(2.) The trustees shall manage or superintend the management of the land, with full power to fell timber or cut underwood from time to time in the usual course for sale, or for repairs or otherwise, and to erect, pull down, rebuild and repair houses, and other buildings and erections, and to continue the working of mines, minerals and quarries which have usually been worked, and to drain or otherwise improve the land or any part thereof, and to insure against loss by fire, and to make allowances to and arrangements with tenants and others, and to determine tenancies, and to accept surrenders of leases and tenancies, and generally to deal with the land in a proper and due course of management; but so that, where the infant is impeachable for waste, the trustees shall not commit waste, and shall cut timber on the same terms only, and subject to the same restrictions, on and subject to which the infant could, if of full age, cut the same.

(3.) The trustees may from time to time, out of the income of the land, including the produce of the sale of timber and underwood, pay the expenses incurred in the management, or in the exercise of any power conferred by this section, or otherwise in relation to the land, and all outgoings not payable by any tenant or other person, and shall keep down any annual sum, and the interest of any principal sum, charged on the land.

(4.) The trustees may apply at discretion any income which, in the exercise of such discretion, they deem proper, according to the infant's age, for his or her maintenance, education or benefit, or pay thereout any money to the infant's parent or guardian, to be applied for the same purposes.

(5.) The trustees shall lay out the residue of the income of the land in investment on securities on which they are by the settlement, if any, or by law, authorized to invest trust money, with power to vary investments; and shall accumulate the income of the investments so made in the way of compound interest, by from time to time similarly investing such income and the resulting income of investments; and shall stand possessed of the accumulated fund arising from income of the land and from investments of income on the trusts following (namely):

- (i.) If the infant attains the age of twenty-one years, then in trust for the infant;
- (ii.) If the infant is a woman and marries while an infant, then

in trust for her separate use, independently of her husband, and so that her receipt after she marries, and though still an infant, shall be a good discharge; but

- (iii.) If the infant dies while an infant, and being a woman without having been married, then, where the infant was, under a settlement, tenant for life, or by purchase tenant in tail or tail male or tail female, on the trusts, if any, declared of the accumulated fund by that settlement; but where no such trusts are declared, or the infant has taken the land from which the accumulated fund is derived by descent, and not by purchase, or the infant is tenant for an estate in fee simple, absolute or determinable, then in trust for the infant's personal representatives, as part of the infant's personal estate;

but the accumulations, or any part thereof, may at any time be applied as if the same were income arising in the then current year.

(6.) Where the infant's estate or interest is in an undivided share of land, the powers of this section relative to the land may be exercised jointly with persons entitled to possession of, or having power to act in relation to, the other undivided share or shares.

(7.) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(8.) This section applies only where that instrument comes into operation after the commencement of this Act.

43.—(1.) Where any property is held by trustees in trust for an infant, either for life, or for any greater interest, and whether absolutely, or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education or benefit, the income of that property, or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education, or not.

Application  
by trustees  
of income of  
property of  
infant for  
maintenance,  
&c.

(2.) The trustees shall accumulate all the residue of that income in the way of compound interest, by investing the same and the resulting income thereof from time to time on securities on which they are by the settlement, if any, or by law, authorized to invest trust money, and shall hold those accumulations for the benefit of the person who ultimately becomes entitled to the property from which the same arise; but so that the trustees may at any time, if they think fit, apply those accumulations, or any part thereof, as if the same were income arising in the then current year.

(3.) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(4.) This section applies whether that instrument comes into operation before or after the commencement of this Act.

45 & 46 Vict.  
c. 38.

45 & 46 VICT. c. 38 (SETTLED LAND ACT, 1882).

*An Act for facilitating Sales, Leases, and other dispositions of Settled Land, and for promoting the execution of Improvements thereon.* [10th August, 1882.]

#### I.—PRELIMINARY.

Short title;  
commence-  
ment; extent.

1.—(1.) This Act may be cited as the Settled Land Act, 1882.

(2.) This Act, except where it is otherwise expressed, shall commence and take effect from and immediately after the thirty-first day of December one thousand eight hundred and eighty-two, which time is in this Act referred to as the commencement of this Act.

(3.) This Act does not extend to Scotland.

#### II.—DEFINITIONS.

Definition of  
settlement,  
tenant for  
life, &c.

2.—(1.) Any deed, will, agreement for a settlement, or other agreement, covenant to surrender, copy of court roll, act of parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, under or by virtue of which instrument or instruments any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates or is for purposes of this Act a settlement, and is in this Act referred to as a settlement, or as the settlement, as the case requires.

(2.) An estate or interest in remainder or reversion not disposed of by a settlement, and reverting to the settlor or descending to the testator's heir, is for purposes of this Act an estate or interest coming to the settlor or heir under or by virtue of the settlement, and comprised in the subject of the settlement.

(3.) Land, and any estate or interest therein, which is the subject of a settlement, is for purposes of this Act settled land, and is, in relation to the settlement, referred to in this Act as the settled land.

(4.) The determination of the question whether land is settled land, for purposes of this Act, or not, is governed by the state of facts, and the limitations of the settlement, at the time of the settlement taking effect.

(5.) The person who is for the time being, under a settlement,

beneficially entitled to possession of settled land, for his life, is for purposes of this Act the tenant for life of that land, and the tenant for life under that settlement.

(6.) If, in any case, there are two or more persons so entitled as tenants in common, or as joint tenants, or for other concurrent estates or interests, they together constitute the tenant for life for purposes of this Act.

(7.) A person being tenant for life within the foregoing definitions shall be deemed to be such notwithstanding that, under the settlement or otherwise, the settled land, or his estate or interest therein, is incumbered or charged in any manner or to any extent.

(8.) The persons, if any, who are for the time being, under a settlement, trustees with power of sale of settled land, or with power of consent to or approval of the exercise of such a power of sale, or if under a settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purposes of this Act, are for purposes of this Act trustees of the settlement.

(9.) Capital money arising under this Act, and receivable for the trusts and purposes of the settlement, is in this Act referred to as capital money arising under this Act.

(10.) In this Act—

(i.) Land includes incorporeal hereditaments, also an undivided share in land; income includes rents and profits; and possession includes receipt of income:

(ii.) Rent includes yearly or other rent, and toll, duty, royalty, or other reservation, by the acre, or the ton, or otherwise; and, in relation to rent, payment includes delivery; and fine includes premium or fore-gift, and any payment, consideration, or benefit in the nature of a fine, premium, or fore-gift:

(iii.) Building purposes include the erecting and the improving of, and the adding to, and the repairing of buildings; and a building lease is a lease for any building purposes or purposes connected therewith:

(iv.) Mines and minerals mean mines and minerals whether already opened or in work or not, and include all minerals and substances in, on, or under the land, obtainable by underground or by surface working; and mining purposes include the sinking and searching for, winning, working, getting, making merchantable, smelting or otherwise converting or working for the purposes of any manufacture, carrying away, and disposing of mines and minerals, in or under the settled land, or any other land, and the erection of buildings, and the execution of engineering and other works, suitable for those purposes; and a mining lease is a lease

for any mining purposes or purposes connected therewith, and includes a grant or licence for any mining purposes :

(v.) Manor includes lordship, and reputed manor or lordship :

(vi.) Steward includes deputy steward, or other proper officer, of a manor :

(vii.) Will includes codicil, and other testamentary instrument, and a writing in the nature of a will :

(viii.) Securities include stocks, funds and shares :

(ix.) Her Majesty's High Court of Justice is referred to as the court :

(x.) The Land Commissioners for England as constituted by this Act are referred to as the Land Commissioners :

(xi.) Person includes corporation.

### III.—SALE ; ENFRANCHISEMENT ; EXCHANGE ; PARTITION.

#### *General Powers and Regulations.*

Powers to  
tenant for  
life to sell,  
&c.

#### 3. A tenant for life—

(i.) May sell the settled land, or any part thereof, or any easement, right or privilege of any kind, over or in relation to the same ; and

(ii.) Where the settlement comprises a manor,—may sell the seignory of any freehold land within the manor, or the freehold and inheritance of any copyhold or customary land, parcel of the manor, with or without any exception or reservation of all or any mines or minerals, or of any rights or powers relative to mining purposes, so as in every such case to effect an enfranchisement ; and

(iii.) May make an exchange of the settled land, or any part thereof, for other land, including an exchange in consideration of money paid for equality of exchange ; and

(iv.) Where the settlement comprises an undivided share in land, or, under the settlement, the settled land has come to be held in undivided shares,—may concur in making partition of the entirety, including a partition in consideration of money paid for equality of partition.

Regulations  
respecting  
sale, enfran-  
chisement,  
exchange and  
partition.

4.—(1.) Every sale shall be made at the best price that can reasonably be obtained.

(2.) Every exchange and every partition shall be made for the best consideration in land or in land and money that can reasonably be obtained.

(3.) A sale may be made in one lot or in several lots, and either by auction or by private contract.

(4.) On a sale the tenant for life may fix reserve biddings and buy in at an auction.

(5.) A sale, exchange or partition may be made subject to any stipulations respecting title, or evidence of title, or other things.

(6.) On a sale, exchange or partition, any restriction or reservation with respect to building on or other user of land, or with respect to mines and minerals, or with respect to or for the purpose of the more beneficial working thereof, or with respect to any other thing, may be imposed or reserved and made binding, as far as the law permits, by covenant, condition or otherwise, on the tenant for life and the settled land, or any part thereof, or on the other party and any land sold or given in exchange or on partition to him.

(7.) An enfranchisement may be made with or without a re-grant of any right of common or other right, easement or privilege theretofore appendant or appurtenant to or held or enjoyed with the land enfranchised, or reputed so to be.

(8.) Settled land in England shall not be given in exchange for land out of England.

*Special Powers.*

5. Where on a sale, exchange or partition there is an incumbrance affecting land sold or given in exchange or on partition, the tenant for life, with the consent of the incumbrancer, may charge that incumbrance on any other part of the settled land, whether already charged therewith or not, in exoneration of the part sold or so given, and, by conveyance of the fee simple, or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or otherwise, make provision accordingly.

Transfer of  
incumbrances  
on land sold,  
&c.

IV.—LEASES.

*General Powers and Regulations.*

6. A tenant for life may lease the settled land, or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same, for any purpose whatever, whether involving waste or not, for any term not exceeding—

Power for  
tenant for  
life to lease for  
ordinary or  
building or  
mining pur-  
poses.

(i.) In case of a building lease, ninety-nine years:

(ii.) In case of a mining lease, sixty years:

(iii.) In case of any other lease, twenty-one years.

7.—(1.) Every lease shall be by deed, and be made to take effect in possession not later than twelve months after its date.

Regulations  
respecting  
leases  
generally.

(2.) Every lease shall reserve the best rent that can reasonably be obtained, regard being had to any fine taken, and to any money laid out or to be laid out for the benefit of the settled land, and generally to the circumstances of the case.

(3.) Every lease shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days.

(4.) A counterpart of every lease shall be executed by the lessee and delivered to the tenant for life; of which execution and delivery the execution of the lease by the tenant for life shall be sufficient evidence.

(5.) A statement, contained in a lease or in an indorsement thereon, signed by the tenant for life, respecting any matter of fact or of calculation under this Act in relation to the lease, shall, in favour of the lessee and of those claiming under him, be sufficient evidence of the matter stated.

*Building and Mining Leases.*

Regulations  
respecting  
building  
leases.

8.—(1.) Every building lease shall be made partly in consideration of the lessee, or some person by whose direction the lease is granted, or some other person, having erected, or agreeing to erect, buildings, new or additional, or having improved or repaired, or agreeing to improve or repair, buildings, or having executed, or agreeing to execute, on the land leased, an improvement authorized by this Act, for or in connexion with building purposes.

(2.) A peppercorn rent or a nominal or other rent less than the rent ultimately payable, may be made payable for the first five years or any less part of the term.

(3.) Where the land is contracted to be leased in lots, the entire amount of rent to be ultimately payable may be apportioned among the lots in any manner; save that—

(i.) The annual rent reserved by any lease shall not be less than ten shillings; and

(ii.) The total amount of the rents reserved on all leases for the time being granted shall not be less than the total amount of the rents which, in order that the leases may be in conformity with this Act, ought to be reserved in respect of the whole land for the time being leased; and

(iii.) The rent reserved by any lease shall not exceed one-fifth part of the full annual value of the land comprised in that lease with the buildings thereon when completed.

Regulations  
respecting  
mining leases.

9.—(1.) In a mining lease—

(i.) The rent may be made to be ascertainable by or to vary according to the acreage worked, or by or according to the quantities of any mineral or substance gotten, made merchantable, converted, carried away, or disposed of, in or from the settled land, or any other land, or by or according to any facilities given in that behalf; and

(ii.) A fixed or minimum rent may be made payable, with or without power for the lessee, in case the rent, according to acreage or quantity, in any specified period does not produce

an amount equal to the fixed or minimum rent, to make up the deficiency in any subsequent specified period, free of rent other than the fixed or minimum rent.

(2.) A lease may be made partly in consideration of the lessee having executed, or his agreeing to execute, on the land leased, an improvement authorized by this Act, for or in connexion with mining purposes.

10.—(1.) Where it is shown to the court with respect to the district in which any settled land is situate, either—

Variation of building or mining lease according to circumstances of district.

(i.) That it is the custom for land therein to be leased or granted for building or mining purposes for a longer term or on other conditions than the term or conditions specified in that behalf in this Act, or in perpetuity; or

(ii.) That it is difficult to make leases or grants for building or mining purposes of land therein, except for a longer term or on other conditions than the term and conditions specified in that behalf in this Act, or except in perpetuity;

the court may, if it thinks fit, authorize generally the tenant for life to make from time to time leases or grants of or affecting the settled land in that district, or parts thereof, for any term or in perpetuity, at fee-farm or other rents, secured by condition of re-entry, or otherwise, as in the order of the court expressed, or may, if it thinks fit, authorize the tenant for life to make any such lease or grant in any particular case.

(2.) Thereupon the tenant for life, and, subject to any direction in the order of the court to the contrary, each of his successors in title being a tenant for life, or having the powers of a tenant for life under this Act, may make in any case, or in the particular case, a lease or grant of or affecting the settled land, or part thereof, in conformity with the order.

11. Under a mining lease, whether the mines or minerals leased are already opened or in work or not, unless a contrary intention is expressed in the settlement, there shall be from time to time set aside, as capital money arising under this Act, part of the rent as follows, namely,—where the tenant for life is impeachable for waste in respect of minerals, three-fourth parts of the rent, and otherwise one-fourth part thereof, and in every such case the residue of the rent shall go as rents and profits.

Part of mining rent to be set aside.

#### *Special Powers.*

12. The leasing power of a tenant for life extends to the making of—

Leasing powers for special objects.

(i.) A lease for giving effect to a contract entered into by any of his predecessors in title for making a lease, which, if made



by the predecessor, would have been binding on the successors in title; and

- (ii.) A lease for giving effect to a covenant of renewal, performance whereof could be enforced against the owner for the time being of the settled land; and
- (iii.) A lease for confirming, as far as may be, a previous lease, being void or voidable; but so that every lease, as and when confirmed, shall be such a lease as might at the date of the original lease have been lawfully granted, under this Act, or otherwise, as the case may require.

#### *Surrenders.*

Surrender  
and new grant  
of leases.

13.—(1.) A tenant for life may accept, with or without consideration, a surrender of any lease of settled land, whether made under this act or not, in respect of the whole land leased, or any part thereof, with or without an exception of all or any of the mines and minerals therein, or in respect of mines and minerals, or any of them.

(2.) On a surrender of a lease in respect of part only of the land or mines and minerals leased, the rent may be apportioned.

(3.) On a surrender, the tenant for life may make of the land or mines and minerals surrendered, or of any part thereof, a new or other lease, or new or other leases in lots.

(4.) A new or other lease may comprise additional land or mines and minerals, and may reserve any apportioned or other rent.

(5.) On a surrender, and the making of a new or other lease, whether for the same or for any extended or other term, and whether or not subject to the same or to any other covenants, provisions, or conditions, the value of the lessee's interest in the lease surrendered may be taken into account in the determination of the amount of the rent to be reserved, and of any fine to be taken, and of the nature of the covenants, provisions, and conditions to be inserted in the new or other lease.

(6.) Every new or other lease shall be in conformity with this Act.

#### *Copyholds.*

Power to  
grant to  
copyholders  
licences for  
leasing.

14.—(1.) A tenant for life may grant to a tenant of copyhold or customary land, parcel of a manor comprised in the settlement, a licence to make any such lease of that land, or of a specified part thereof, as the tenant for life is by this Act empowered to make of freehold land.

(2.) The licence may fix the annual value whereon fines, fees or other customary payments are to be assessed, or the amount of those fines, fees or payments.

(3.) The licence shall be entered on the court rolls of the manor, of which entry a certificate in writing of the steward shall be sufficient evidence.

V.—SALES, LEASES, AND OTHER DISPOSITIONS.

*Mansion and Park.*

15. Notwithstanding anything in this Act, the principal mansion house on any settled land, and the demesnes thereof, and other lands usually occupied therewith, shall not be sold or leased by the tenant for life, without the consent of the trustees of the settlement, or an order of the Court.

Restriction as to mansion house, park, &c.

*Streets and Open Spaces.*

16. On or in connection with a sale or grant for building purposes, or a building lease, the tenant for life, for the general benefit of the residents on the settled land, or on any part thereof—

Dedication for streets, open spaces, &c.

- (i.) May cause or require any parts of the settled land to be appropriated and laid out for streets, roads, paths, squares, gardens, or other open spaces, for the use, gratuitously or on payment, of the public or of individuals, with sewers, drains, watercourses, fencing, paving, or other works necessary or proper in connection therewith; and
- (ii.) May provide that the parts so appropriated shall be conveyed to or vested in the trustees of the settlement, or other trustees, or any company or public body, on trusts or subject to provisions for securing the continued appropriation thereof to the purposes aforesaid, and the continued repair or maintenance of streets and other places and works aforesaid, with or without provision for appointment of new trustees when required; and
- (iii.) May execute any general or other deed necessary or proper for giving effect to the provisions of this section (which deed may be inrolled in the Central Office of the Supreme Court of Judicature), and thereby declare the mode, terms and conditions of the appropriation, and the manner in which and the persons by whom the benefit thereof is to be enjoyed, and the nature and extent of the privileges and conveniences granted.

*Surface and Minerals apart.*

17.—(1.) A sale, exchange, partition or mining lease, may be made either of land, with or without an exception or reservation of all or any of the mines and minerals therein, or of any mines and minerals, and in any such case with or without a grant or reservation of powers of working, wayleaves or rights of way, rights of water and drainage, and other powers, easements, rights and privileges for or incident to or connected with mining purposes, in relation to the settled land, or any part thereof, or any other land.

Separate dealing with surface and minerals, with or without wayleaves, &c.

(2.) An exchange or partition may be made subject to and in consideration of the reservation of an undivided share in mines or minerals.

*Mortgage.*

Mortgage  
for equality  
money, &c.

18. Where money is required for enfranchisement, or for equality of exchange or partition, the tenant for life may raise the same on mortgage of the settled land, or of any part thereof, by conveyance of the fee simple, or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or otherwise, and the money raised shall be capital money arising under this Act.

*Undivided Share.*

Concurrence  
in exercise of  
powers as to  
undivided  
share.

19. Where the settled land comprises an undivided share in land, or, under the settlement, the settled land has come to be held in undivided shares, the tenant for life of an undivided share may join or concur, in any manner and to any extent necessary or proper for any purpose of this Act, with any person entitled to or having power or right of disposition of or over another undivided share.

*Conveyance.*

Completion of  
sale, lease,  
&c. by con-  
veyance.

20.—(1.) On a sale, exchange, partition, lease, mortgage or charge, the tenant for life may, as regards land sold, given in exchange or on partition, leased, mortgaged or charged, or intended so to be, including copyhold or customary or leasehold land vested in trustees, or as regards easements or other rights or privileges sold or leased, or intended so to be, convey or create the same by deed, for the estate or interest the subject of the settlement, or for any less estate or interest, to the uses and in the manner requisite for giving effect to the sale, exchange, partition, lease, mortgage or charge.

(2.) Such a deed, to the extent and in the manner to and in which it is expressed or intended to operate and can operate under this Act, is effectual to pass the land conveyed, or the easements, rights or privileges created, discharged from all the limitations, powers and provisions of the settlement, and from all estates, interests and charges subsisting or to arise thereunder, but subject to and with the exception of—

- (i.) All estates, interests and charges having priority to the settlement; and
- (ii.) All such other, if any, estates, interests and charges as have been conveyed or created for securing money actually raised at the date of the deed; and
- (iii.) All leases and grants at fee farm rents or otherwise, and all grants of easements, rights of common, or other rights or privileges granted or made for value in money or money's

worth, or agreed so to be, before the date of the deed, by the tenant for life, or by any of his predecessors in title, or by any trustees for him or them, under the settlement, or under any statutory power, or being otherwise binding on the successors in title of the tenant for life.

(3.) In case of a deed relating to copyhold or customary land, it is sufficient that the deed be entered on the court rolls of the manor, and the steward is hereby required on production to him of the deed to make the proper entry; and on that production, and on payment of customary fines, fees, and other dues or payments, any person whose title under the deed requires to be perfected by admittance shall be admitted accordingly; but if the steward so requires, there shall also be produced to him so much of the settlement as may be necessary to show the title of the person executing the deed; and the same may, if the steward thinks fit, be also entered on the court rolls.

#### VI.—INVESTMENT OR OTHER APPLICATION OF CAPITAL TRUST MONEY.

21. Capital money arising under this Act, subject to payment of claims properly payable thereout, and to application thereof for any special authorized object for which the same was raised, shall, when received, be invested or otherwise applied wholly in one, or partly in one and partly in another or others, of the following modes (namely):

Capital money under Act; investment, &c. by trustees or Court.

- (i.) In investment on government securities, or on other securities on which the trustees of the settlement are by the settlement or by law authorized to invest trust money of the settlement, or on the security of the bonds, mortgages, or debentures, or in the purchase of the debenture stock, of any railway company in Great Britain or Ireland incorporated by special Act of Parliament, and having for ten years next before the date of investment paid a dividend on its ordinary stock or shares, with power to vary the investment into or for any other such securities:
- (ii.) In discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land, or other the whole estate the subject of the settlement, or of land-tax, rentcharge in lieu of tithe, crown rent, chief rent, or quit rent charged on or payable out of the settled land:
- (iii.) In payment for any improvement authorized by this Act:
- (iv.) In payment for equality of exchange or partition of settled land:
- (v.) In purchase of the seignory of any part of the settled land, being freehold land, or in purchase of the fee simple of any part of the settled land, being copyhold or customary land:

- (vi.) In purchase of the reversion or freehold in fee of any part of the settled land, being leasehold land held for years, or life, or years determinable on life :
- (vii.) In purchase of land in fee simple, or of copyhold or customary land, or of leasehold land held for sixty years or more unexpired at the time of purchase, subject or not to any exception or reservation of or in respect of mines or minerals therein, or of or in respect of rights or powers relative to the working of mines or minerals therein, or in other land :
- (viii.) In purchase, either in fee simple, or for a term of sixty years or more, of mines and minerals convenient to be held or worked with the settled land, or of any easement, right, or privilege convenient to be held with the settled land for mining or other purposes :
- (ix.) In payment to any person becoming absolutely entitled or empowered to give an absolute discharge :
- (x.) In payment of costs, charges, and expenses of or incidental to the exercise of any of the powers, or the execution of any of the provisions, of this Act :
- (xi.) In any other mode in which money produced by the exercise of a power of sale in the settlement is applicable thereunder.

Regulations  
respecting  
investment,  
devolution  
and income of  
securities, &c.

22.—(1.) Capital money arising under this Act shall, in order to its being invested or applied as aforesaid, be paid either to the trustees of the settlement or into Court, at the option of the tenant for life, and shall be invested or applied by the trustees, or under the direction of the Court, as the case may be, accordingly.

(2.) The investment or other application by the trustees shall be made according to the direction of the tenant for life, and in default thereof, according to the discretion of the trustees, but in the last-mentioned case subject to any consent required or direction given by the settlement with respect to the investment or other application by the trustees of trust money of the settlement; and any investment shall be in the names or under the control of the trustees.

(3.) The investment or other application under the direction of the Court shall be made on the application of the tenant for life, or of the trustees.

(4.) Any investment or other application shall not during the life of the tenant for life be altered without his consent.

(5.) Capital money arising under this Act while remaining uninvested or unapplied, and securities on which an investment of any such capital money is made, shall, for all purposes of disposition, transmission and devolution, be considered as land, and the same shall be held for and go to the same persons successively, in the same manner and for and on the same estates, interests and trusts,

as the land wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement.

(6.) The income of those securities shall be paid or applied as the income of that land, if not disposed of, would have been payable, or applicable under the settlement.

(7.) Those securities may be converted into money, which shall be capital money arising under this Act.

23. Capital money arising under this Act from settled land in England shall not be applied in the purchase of land out of England, unless the settlement expressly authorizes the same. Investment  
in land in  
England.

24.—(1.) Land acquired by purchase or in exchange, or on partition, shall be made subject to the settlement in manner directed in this section. Settlement  
of land  
purchased,  
taken in ex-  
change, &c.

(2.) Freehold land shall be conveyed to the uses, on the trusts, and subject to the powers and provisions which, under the settlement, or by reason of the exercise of any power of charging therein contained, are subsisting with respect to the settled land, or as near thereto as circumstances permit, but not so as to increase or multiply charges or powers of charging.

(3.) Copyhold, customary or leasehold land shall be conveyed to and vested in the trustees of the settlement on trusts and subject to powers and provisions corresponding, as nearly as the law and circumstances permit, with the uses, trusts, powers and provisions to on and subject to which freehold land is to be conveyed as aforesaid; so nevertheless that the beneficial interest in land held by lease for years shall not vest absolutely in a person who is by the settlement made by purchase tenant in tail, or in tail male, or in tail female, and who dies under the age of twenty-one years, but shall, on the death of that person under that age, go as freehold land conveyed as aforesaid would go.

(4.) Land acquired as aforesaid may be made a substituted security for any charge in respect of money actually raised, and remaining unpaid, from which the settled land, or any part thereof, or any undivided share therein, has theretofore been released on the occasion and in order to the completion of a sale, exchange or partition.

(5.) Where a charge does not affect the whole of the settled land, then the land acquired shall not be subjected thereto, unless the land is acquired either by purchase with money arising from sale of land which was before the sale subject to the charge, or by an exchange or partition of land which, or an undivided share wherein, was before the exchange or partition subject to the charge.

(6.) On land being so acquired, any person who, by the direction of the tenant for life, so conveys the land as to subject it to any

charge, is not concerned to inquire whether or not it is proper that the land should be subjected to the charge.

(7.) The provisions of this section referring to land extend and apply, as far as may be, to mines and minerals, and to easements, rights and privileges over and in relation to land.

## VII.—IMPROVEMENTS.

### *Improvements with Capital Trust Money.*

Description of improvements authorized by Act.

25. Improvements authorized by this Act are the making or execution on, or in connection with, and for the benefit of settled land, of any of the following works, or of any works for any of the following purposes, and any operation incident to or necessary or proper in the execution of any of those works, or necessary or proper for carrying into effect any of those purposes, or for securing the full benefit of any of those works or purposes (namely):

- (i.) Drainage, including the straightening, widening or deepening of drains, streams and watercourses:
- (ii.) Irrigation; warping:
- (iii.) Drains, pipes and machinery for supply and distribution of sewage as manure:
- (iv.) Embanking or weiring from a river or lake, or from the sea or a tidal water:
- (v.) Groynes; sea walls; defences against water:
- (vi.) Inclosing; straightening of fences; re-division of fields:
- (vii.) Reclamation; dry warping:
- (viii.) Farm roads; private roads; roads or streets in villages or towns:
- (ix.) Clearing; trenching; planting:
- (x.) Cottages for labourers, farm-servants and artisans, employed on the settled land or not:
- (xi.) Farmhouses, offices and out-buildings, and other buildings for farm purposes:
- (xii.) Saw-mills, scutch-mills, and other mills, water-wheels, engine-houses, and kilns, which will increase the value of the settled land for agricultural purposes or as woodland or otherwise:
- (xiii.) Reservoirs, tanks, conduits, watercourses, pipes, wells, ponds, shafts, dams, weirs, sluices, and other works and machinery for supply and distribution of water for agricultural, manufacturing or other purposes, or for domestic or other consumption:
- (xiv.) Tramways; railways; canals; docks:
- (xv.) Jetties, piers, and landing places on rivers, lakes, the sea, or tidal waters, for facilitating transport of persons, and of

agricultural stock and produce, and of manure and other things required for agricultural purposes, and of minerals, and of things required for mining purposes :

(xvi.) Markets and market-places :

(xvii.) Streets, roads, paths, squares, gardens, or other open spaces for the use, gratuitously or on payment, of the public or of individuals, or for dedication to the public, the same being necessary or proper in connexion with the conversion of land into building land :

(xviii.) Sewers, drains, watercourses, pipe-making, fencing, paving, brick-making, tile-making, and other works necessary or proper in connexion with any of the objects aforesaid :

(xix.) Trial pits for mines, and other preliminary works necessary or proper in connexion with development of mines :

(xx.) Reconstruction, enlargement, or improvement of any of those works.

26.—(1.) Where the tenant for life is desirous that capital money arising under this Act shall be applied in or towards payment for an improvement authorized by this Act, he may submit for approval to the trustees of the settlement, or to the Court, as the case may require, a scheme for the execution of the improvement, showing the proposed expenditure thereon.

Approval by  
Land Com-  
missioners of  
scheme for  
improvement  
and payment  
thereon.

(2.) Where the capital money to be expended is in the hands of trustees, then, after a scheme is approved by them, the trustees may apply that money in or towards payment for the whole or part of any work or operation comprised in the improvement, on—

(i.) A certificate of the Land Commissioners certifying that the work or operation, or some specified part thereof, has been properly executed, and what amount is properly payable by the trustees in respect thereof, which certificate shall be conclusive in favour of the trustees as an authority and discharge for any payment made by them in pursuance thereof; or on

(ii.) A like certificate of a competent engineer or able practical surveyor nominated by the trustees and approved by the Commissioners, or by the Court, which certificate shall be conclusive as aforesaid; or on

(iii.) An order of the Court directing or authorizing the trustees to so apply a specified portion of the capital money.

(3.) Where the capital money to be expended is in Court, then, after a scheme is approved by the Court, the Court may, if it thinks fit, on a report or certificate of the Commissioners, or of a competent engineer or able practical surveyor, approved by the Court, or on such other evidence as the Court thinks sufficient, make such order and give such directions as it thinks fit for



the application of that money, or any part thereof, in or towards payment for the whole or part of any work or operation comprised in the improvement.

Concurrence  
in improve-  
ments.

27. The tenant for life may join or concur with any other person interested in executing any improvement authorized by this Act, or in contributing to the cost thereof.

Obligation  
on tenant for  
life and suc-  
cessors to  
maintain,  
insure, &c.

28.—(1.) The tenant for life, and each of his successors in title, having, under the settlement, a limited estate or interest only in the settled land, shall, during such period, if any, as the Land Commissioners by certificate in any case prescribe, maintain and repair, at his own expense, every improvement executed under the foregoing provisions of this Act, and where a building or work in its nature insurable against damage by fire is comprised in the improvement, shall insure and keep insured the same, at his own expense, in such amount, if any, as the Commissioners by certificate in any case prescribe.

(2.) The tenant for life, or any of his successors as aforesaid, shall not cut down or knowingly permit to be cut down, except in proper thinning, any trees planted as an improvement under the foregoing provisions of this Act.

(3.) The tenant for life, and each of his successors as aforesaid, shall from time to time, if required by the Commissioners, on or without the suggestion of any person having, under the settlement, any estate or interest in the settled land in possession, remainder, or otherwise, report to the Commissioners the state of every improvement executed under this Act, and the fact and particulars of fire insurance, if any.

(4.) The Commissioners may vary any certificate made by them under this section, in such manner or to such extent as circumstances appear to them to require, but not so as to increase the liabilities of the tenant for life, or any of his successors as aforesaid.

(5.) If the tenant for life, or any of his successors as aforesaid, fails in any respect to comply with the requisitions of this section, or does any act in contravention thereof, any person having, under the settlement, any estate or interest in the settled land in possession, remainder or reversion, shall have a right of action, in respect of that default or act, against the tenant for life; and the estate of the tenant for life, after his death, shall be liable to make good to the persons entitled under the settlement any damages occasioned by that default or act.

#### *Execution and Repair of Improvements.*

Protection as  
waste  
tion

29. The tenant for life, and each of his successors in title having, under the settlement, a limited estate or interest only in the settled land, and all persons employed by or under contract with the

tenant for life, or any such successor, may from time to time enter on the settled land, and, without impeachment of waste by any remainderman or reversioner, thereon execute any improvement authorized by this Act, or inspect, maintain and repair the same, and, for the purposes thereof, on the settled land, do, make, and use all acts, works and conveniences proper for the execution, maintenance, repair and use thereof, and get and work freestone, limestone, clay, sand and other substances, and make tramways and other ways, and burn and make bricks, tiles and other things, and cut down and use timber and other trees not planted or left standing for shelter or ornament.

*Improvement of Land Act, 1864.*

30. The enumeration of improvements contained in section nine of the Improvement of Land Act, 1864, is hereby extended so as to comprise, subject and according to the provisions of that Act, but only as regards applications made to the Land Commissioners after the commencement of this Act, all improvements authorized by this Act.

Extension  
of 27 & 28  
Vict. c. 114,  
s. 9.

VIII.—CONTRACTS.

31.—(1.) A tenant for life—

- (i.) May contract to make any sale, exchange, partition, mortgage or charge; and
- (ii.) May vary or rescind, with or without consideration, the contract, in the like cases and manner in which, if he were absolute owner of the settled land, he might lawfully vary or rescind the same, but so that the contract as varied be in conformity with this Act; and any such consideration, if paid in money, shall be capital money arising under this Act; and
- (iii.) May contract to make any lease; and in making the lease may vary the terms, with or without consideration, but so that the lease be in conformity with this Act; and
- (iv.) May accept a surrender of a contract for a lease, in like manner and on the like terms in and on which he might accept a surrender of a lease; and thereupon may make a new or other contract, or new or other contracts, for or relative to a lease or leases, in like manner and on the like terms in and on which he might make a new or other lease, or new or other leases, where a lease had been granted; and
- (v.) May enter into a contract for or relating to the execution of any improvement authorized by this Act, and may vary or rescind the same; and
- (vi.) May, in any other case, enter into a contract to do any act for carrying into effect any of the purposes of this Act, and may vary or rescind the same.

Power for  
tenant for  
life to enter  
into contracts.

(2.) Every contract shall be binding on and shall enure for the benefit of the settled land, and shall be enforceable against and by every successor in title for the time being of the tenant for life, and may be carried into effect by any such successor; but so that it may be varied or rescinded by any such successor, in the like case and manner, if any, as if it had been made by himself.

(3.) The Court may, on the application of the tenant for life, or of any such successor, or of any person interested in any contract, give directions respecting the enforcing, carrying into effect, varying or rescinding thereof.

(4.) Any preliminary contract under this Act for or relating to a lease shall not form part of the title or evidence of the title of any person to the lease, or to the benefit thereof.

#### IX.—MISCELLANEOUS PROVISIONS.

Application of money in Court under Lands Clauses and other Acts. 8 & 9 Vict. c. 18. 23 & 24 Vict. c. 106. 32 & 33 Vict. c. 18. 40 & 41 Vict. c. 18.

32. Where, under an Act incorporating or applying, wholly or in part, the Lands Clauses Consolidation Acts, 1845, 1860 and 1869, or under the Settled Estates Act, 1877, or under any other Act, public, local, personal or private, money is at the commencement of this Act in Court, or is afterwards paid into Court, and is liable to be laid out in the purchase of land to be made subject to a settlement, then, in addition to any mode of dealing therewith authorized by the Act under which the money is in Court, that money may be invested or applied as capital money arising under this Act, on the like terms, if any, respecting costs and other things, as nearly as circumstances admit, and (notwithstanding anything in this Act) according to the same procedure, as if the modes of investment or application authorized by this Act were authorized by the Act under which the money is in Court.

Application of money in hands of trustees under powers of settlement.

33. Where, under a settlement, money is in the hands of trustees, and is liable to be laid out in the purchase of land to be made subject to the settlement, then, in addition to such powers of dealing therewith as the trustees have independently of this Act, they may, at the option of the tenant for life, invest or apply the same as capital money arising under this Act.

Application of money paid for lease or reversion.

34. Where capital money arising under this Act is purchase money paid in respect of a lease for years, or life, or years determinable on life, or in respect of any other estate or interest in land less than the fee simple, or in respect of a reversion dependent on any such lease, estate or interest, the trustees of the settlement or the Court, as the case may be, and in the case of the Court on the application of any party interested in that money, may, notwithstanding anything in this Act, require and cause the same to be laid out, invested, accumulated and paid in such manner as, in the judgment of the trustees or of the Court, as the case may be, will give

to the parties interested in that money the like benefit therefrom as they might lawfully have had from the lease, estate, interest or reversion in respect whereof the money was paid, or as near thereto as may be.

35.—(1.) Where a tenant for life is impeachable for waste in respect of timber, and there is on the settled land timber ripe and fit for cutting, the tenant for life, on obtaining the consent of the trustees of the settlement or an order of the Court, may cut and sell that timber, or any part thereof.

Cutting and sale of timber, and part of proceeds to be set aside.

(2.) Three fourth parts of the net proceeds of the sale shall be set aside as and be capital money arising under this Act, and the other fourth part shall go as rents and profits.

36. The Court may, if it thinks fit, approve of any action, defence, petition to parliament, parliamentary opposition, or other proceeding taken or proposed to be taken for protection of settled land, or of any action or proceeding taken or proposed to be taken for recovery of land being or alleged to be subject to a settlement, and may direct that any costs, charges or expenses incurred or to be incurred in relation thereto, or any part thereof, be paid out of property subject to the settlement.

Proceedings for protection or recovery of land settled or claimed as settled.

37.—(1.) Where personal chattels are settled on trust so as to devolve with land until a tenant in tail by purchase is born or attains the age of twenty-one years, or so as otherwise to vest in some person becoming entitled to an estate of freehold of inheritance in the land, a tenant for life of the land may sell the chattels or any of them.

Heirlooms.

(2.) The money arising by the sale shall be capital money arising under this Act, and shall be paid, invested or applied and otherwise dealt with in like manner in all respects as by this Act directed with respect to other capital money arising under this Act, or may be invested in the purchase of other chattels, of the same or any other nature, which, when purchased, shall be settled and held on the same trusts, and shall devolve in the same manner as the chattels sold.

(3.) A sale or purchase of chattels under this section shall not be made without an order of the Court.

#### X.—TRUSTEES.

38.—(1.) If at any time there are no trustees of a settlement within the definition in this Act, or where in any other case it is expedient, for purposes of this Act, that new trustees of a settlement be appointed, the Court may, if it thinks fit, on the application of the tenant for life or of any other person having, under the settlement, an estate or interest in the settled land, in pos-

Appointment of trustees by Court.

session, remainder or otherwise, or, in the case of an infant, of his testamentary or other guardian, or next friend, appoint fit persons to be trustees under the settlement for purposes of this Act.

(2.) The persons so appointed, and the survivors and survivor of them, while continuing to be trustees or trustee, and, until the appointment of new trustees, the personal representatives or representative for the time being of the last surviving or continuing trustee, shall for purposes of this Act become and be the trustees or trustee of the settlement.

Number of  
trustees to act.

39.—(1.) Notwithstanding anything in this Act, capital money arising under this Act shall not be paid to fewer than two persons as trustees of a settlement, unless the settlement authorizes the receipt of capital trust money of the settlement by one trustee.

(2.) Subject thereto, the provisions of this Act referring to the trustees of a settlement apply to the surviving or continuing trustees or trustee of the settlement for the time being.

Trustees'  
receipts.

40. The receipt in writing of the trustees of a settlement, or where one trustee is empowered to act, of one trustee, or of the personal representatives or representative of the last surviving or continuing trustee, for any money or securities, paid or transferred to the trustees, trustee, representatives or representative, as the case may be, effectually discharges the payer or transferor therefrom, and from being bound to see to the application or being answerable for any loss or misapplication thereof, and, in case of a mortgagee or other person advancing money, from being concerned to see that any money advanced by him is wanted for any purpose of this Act, or that no more than is wanted is raised.

Protection of  
each trustee  
individually.

41. Each person who is for the time being trustee of a settlement is answerable for what he actually receives only, notwithstanding his signing any receipt for conformity, and in respect of his own acts, receipts and defaults only, and is not answerable in respect of those of any other trustee, or of any banker, broker, or other person, or for the insufficiency or deficiency of any securities, or for any loss not happening through his own wilful default.

Protection of  
trustees  
generally.

42. The trustees of a settlement, or any of them, are not liable for giving any consent, or for not making, bringing, taking or doing any such application, action, proceeding or thing, as they might make, bring, take or do; and in case of purchase of land with capital money arising under this Act, or of an exchange, partition, or lease, are not liable for adopting any contract made by the tenant for life, or bound to inquire as to the propriety of the purchase, exchange, partition or lease, or answerable as regards any price, consideration or fine, and are not liable to see to or

answerable for the investigation of the title, or answerable for a conveyance of land, if the conveyance purports to convey the land in the proper mode, or liable in respect of purchase-money paid by them by direction of the tenant for life to any person joining in the conveyance as a conveying party, or as giving a receipt for the purchase-money, or in any other character, or in respect of any other money paid by them by direction of the tenant for life on the purchase, exchange, partition or lease.

43. The trustees of a settlement may reimburse themselves or pay and discharge out of the trust property all expenses properly incurred by them. Trustees' reimbursement.

44. If at any time a difference arises between a tenant for life and the trustees of the settlement, respecting the exercise of any of the powers of this Act, or respecting any matter relating thereto, the Court may, on the application of either party, give such directions respecting the matter in difference, and respecting the costs of the application, as the Court thinks fit. Reference of differences to court.

45.—(1.) A tenant for life, when intending to make a sale, exchange, partition, lease, mortgage or charge, shall give notice of his intention in that behalf to each of the trustees of the settlement, by posting registered letters, containing the notice, addressed to the trustees, severally, each at his usual or last known place of abode in the United Kingdom, and shall give like notice to the solicitor for the trustees, if any such solicitor is known to the tenant for life, by posting a registered letter, containing the notice, addressed to the solicitor at his place of business in the United Kingdom, every letter under this section being posted not less than one month before the making by the tenant for life of the sale, exchange, partition, lease, mortgage or charge, or of a contract for the same. Notice to trustees.

(2.) Provided that at the date of notice given the number of trustees shall not be less than two, unless a contrary intention is expressed in the settlement.

(3.) A person dealing in good faith with the tenant for life is not concerned to inquire respecting the giving of any such notice as is required by this section.

#### XI.—COURT; LAND COMMISSIONERS; PROCEDURE.

46.—(1.) All matters within the jurisdiction of the Court under this Act shall, subject to the Acts regulating the Court, be assigned to the Chancery Division of the Court. Regulations respecting payments into Court, applications, &c.

(2.) Payment of money into Court effectually exonerates therefrom the person making the payment.

(3.) Every application to the Court shall be by petition, or by summons at chambers.

(4.) On an application by the trustees of a settlement notice shall be served in the first instance on the tenant for life.

(5.) On any application notice shall be served on such persons, if any, as the Court thinks fit.

(6.) The Court shall have full power and discretion to make such order as it thinks fit respecting the costs, charges, or expenses of all or any of the parties to any application, and may, if it thinks fit, order that all or any of those costs, charges, or expenses be paid out of property subject to the settlement.

39 & 40 Vict.  
c. 59.  
44 & 45 Vict.  
c. 68.

(7.) General rules for purposes of this Act shall be deemed Rules of Court within section seventeen of the Appellate Jurisdiction Act, 1876, as altered by section nineteen of the Supreme Court of Judicature Act, 1881, and may be made accordingly.

(8.) The powers of the Court may, as regards land in the County Palatine of Lancaster, be exercised also by the Court of Chancery of the County Palatine; and rules for regulating proceedings in that Court shall be from time to time made by the Chancellor of the Duchy of Lancaster, with the advice and consent of a judge of the High Court acting in the Chancery Division, and of the Vice-Chancellor of the County Palatine.

(9.) General rules, and rules for the Court of Chancery of the County Palatine, may be made at any time after the passing of this Act, to take effect on or after the commencement of this Act.

(10.) The powers of the Court may, as regards land not exceeding in capital value five hundred pounds, or in annual rateable value thirty pounds, and, as regards capital money arising under this Act, and securities in which the same is invested, not exceeding in amount or value five hundred pounds, and as regards personal chattels settled or to be settled, as in this Act mentioned, not exceeding in value five hundred pounds, be exercised by any county court within the district whereof is situate any part of the land which is to be dealt with in the Court, or from which the capital money to be dealt with in the Court arises under this Act, or in connexion with which the personal chattels to be dealt with in the Court are settled.

Payment of  
costs out of  
settled prop-  
erty.

47. Where the Court directs that any costs, charges, or expenses be paid out of property subject to a settlement, the same shall, subject and according to the directions of the Court, be raised, and paid out of capital money arising under this Act, or other money liable to be laid out in the purchase of land to be made subject to the settlement, or out of investments representing such money, or out of income of any such money or investments, or out of any accumulations of income of land, money, or investments, or by means of a sale of part of the settled land in respect whereof the costs, charges, or expenses are incurred, or of other settled land

comprised in the same settlement and subject to the same limitations, or by means of a mortgage of the settled land or any part thereof, to be made by such person as the Court directs, and either by conveyance of the fee simple or other estate or interest the subject of the settlement, or by creation of a term, or otherwise, or by means of a charge on the settled land or any part thereof, or partly in one of those modes and partly in another or others, or in any such other mode as the Court thinks fit.

48.—(1.) The commissioners now bearing the three several styles of the Inclosure Commissioners for England and Wales, and the Copyhold Commissioners, and the Tithe Commissioners for England and Wales, shall, by virtue of this Act, become and shall be styled the Land Commissioners for England.

Constitution  
of Land Com-  
missioners;  
their powers,  
&c.

(2.) The Land Commissioners shall cause one seal to be made with their style as given by this Act; and in the execution and discharge of any power or duty under any Act relating to the three several bodies of commissioners aforesaid, they shall adopt and use the seal and style of the Land Commissioners for England, and no other.

(3.) Nothing in the foregoing provisions of this section shall be construed as altering in any respect the powers, authorities, or duties of the Land Commissioners, or as affecting in respect of appointment, salary, pension, or otherwise any of those commissioners, in office at the passing of this Act, or any Assistant Commissioner, secretary, or other officer or person then in office or employed under them.

(4.) All Acts of Parliament, judgments, decrees, or orders of any Court, awards, deeds, and other documents, passed or made before the commencement of this Act, shall be read and have effect as if the Land Commissioners were therein mentioned instead of one or more of the three several bodies of commissioners aforesaid.

(5.) All acts, matters, and things commenced by or under the authority of any one or more of the three several bodies of commissioners aforesaid before the commencement of this Act, and not then completed, shall and may be carried on and completed by or under the authority of the Land Commissioners; and the Land Commissioners, for the purpose of prosecuting, or defending, and carrying on any action, suit or proceeding pending at the commencement of this Act, shall come into the place of any one or more, as the case may require, of the three several bodies of commissioners aforesaid.

(6.) The Land Commissioners shall, by virtue of this Act, have, for the purposes of any Act, public, local, personal, or private, passed or to be passed, making provision for the execution of im-



27 & 28 Vict.  
c. 114.

provements on settled land, all such powers and authorities as they have for the purposes of the Improvement of Land Act, 1864; and the provisions of the last-mentioned Act relating to their proceedings and inquiries, and to authentication of instruments, and to declarations, statements, notices, applications, forms, security for expenses, inspections, and examinations, shall extend and apply, as far as the nature and circumstances of the case admit, to acts and proceedings done or taken by or in relation to the Land Commissioners under any Act making provision as last aforesaid; and the provisions of any Act relating to fees or to security for costs to be taken in respect of the business transacted under the Acts administered by the three several bodies of commissioners aforesaid shall extend and apply to the business transacted by or under the direction of the Land Commissioners under any Act, public, local, personal, or private, passed or to be passed, by which any power or duty is conferred or imposed on them.

Filing of  
certificates,  
&c. of com-  
missioners.

49.—(1.) Every certificate and report approved and made by the Land Commissioners under this Act shall be filed in their office.

(2.) An office copy of any certificate or report so filed shall be delivered out of their office to any person requiring the same, on payment of the proper fee, and shall be sufficient evidence of the certificate or report whereof it purports to be a copy.

## XII.—RESTRICTIONS, SAVINGS AND GENERAL PROVISIONS.

Powers not  
assignable;  
contract not  
to exercise  
powers void.

50.—(1.) The powers under this Act of a tenant for life are not capable of assignment or release, and do not pass to a person as being, by operation of law or otherwise, an assignee of a tenant for life, and remain exerciseable by the tenant for life after and notwithstanding any assignment, by operation of law or otherwise, of his estate or interest under the settlement.

(2.) A contract by a tenant for life not to exercise any of his powers under this Act is void.

(3.) But this section shall operate without prejudice to the rights of any person being an assignee for value of the estate or interest of the tenant for life; and in that case the assignee's rights shall not be affected without his consent, except that, unless the assignee is actually in possession of the settled land or part thereof, his consent shall not be requisite for the making of leases thereof by the tenant for life, provided the leases are made at the best rent that can reasonably be obtained, without fine, and in other respects are in conformity with this Act.

(4.) This section extends to assignments made or coming into operation before or after and to acts done before or after the commencement of this Act; and in this section assignment includes

assignment by way of mortgage, and any partial or qualified assignment, and any charge or incumbrance; and assignee has a meaning corresponding with that of assignment.

51.—(1.) If in a settlement, will, assurance, or other instrument executed or made before or after, or partly before and partly after, the commencement of this Act a provision is inserted purporting or attempting, by way of direction, declaration, or otherwise, to forbid a tenant for life to exercise any power under this Act, or attempting, or tending, or intended, by a limitation, gift, or disposition over of settled land, or by a limitation, gift, or disposition of other real or any personal property, or by the imposition of any condition, or by forfeiture, or in any other manner whatever, to prohibit or prevent him from exercising, or to induce him to abstain from exercising, or to put him into a position inconsistent with his exercising, any power under this Act, that provision, as far as it purports, or attempts, or tends, or is intended to have, or would or might have, the operation aforesaid, shall be deemed to be void.

Prohibition or limitation against exercise of powers, void.

(2.) For the purposes of this section an estate or interest limited to continue so long only as a person abstains from exercising any power shall be and take effect as an estate or interest to continue for the period for which it would continue if that person were to abstain from exercising the power, discharged from liability to determination or cesser by or on his exercising the same.

52. Notwithstanding anything in a settlement, the exercise by the tenant for life of any power under this Act shall not occasion a forfeiture.

Provision against forfeiture.

53. A tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties.

Tenant for life trustee for all parties interested.

54. On a sale, exchange, partition, lease, mortgage, or charge, a purchaser, lessee, mortgagee, or other person dealing in good faith with a tenant for life shall, as against all parties entitled under the settlement, be conclusively taken to have given the best price, consideration, or rent, as the case may require, that could reasonably be obtained by the tenant for life, and to have complied with all the requisitions of this Act.

General protection of purchasers, &c.

55.—(1.) Powers and authorities conferred by this Act on a tenant for life or trustees or the Court or the Land Commissioners are exerciseable from time to time.

Exercise of powers; limitation of provisions, &c.

(2.) Where a power of sale, enfranchisement, exchange, partition, leasing, mortgaging, charging, or other power is exercised by a tenant for life, or by the trustees of a settlement, he and they may

respectively execute, make and do all deeds, instruments and things necessary or proper in that behalf.

(3.) Where any provision in this Act refers to sale, purchase, exchange, partition, leasing, or other dealing, or to any power, consent, payment, receipt, deed, assurance, contract, expenses, act, or transaction, the same shall be construed to extend only (unless it is otherwise expressed) to sales, purchases, exchanges, partitions, leasings, dealings, powers, consents, payments, receipts, deeds, assurances, contracts, expenses, acts, and transactions under this Act.

Saving for  
other powers.

56.—(1.) Nothing in this Act shall take away, abridge, or prejudicially affect any power for the time being subsisting under a settlement, or by statute or otherwise, exercisable by a tenant for life, or by trustees with his consent, or on his request, or by his direction, or otherwise; and the powers given by this Act are cumulative.

(2.) But, in case of conflict between the provisions of a settlement and the provisions of this Act, relative to any matter in respect whereof the tenant for life exercises or contracts or intends to exercise any power under this Act, the provisions of this Act shall prevail; and, accordingly, notwithstanding anything in the settlement, the consent of the tenant for life shall, by virtue of this Act, be necessary to the exercise by the trustees of the settlement or other person of any power conferred by the settlement exercisable for any purpose provided for in this Act.

(3.) If a question arises, or a doubt is entertained, respecting any matter within this section, the Court may, on the application of the trustees of the settlement, or of the tenant for life, or of any other person interested, give its decision, opinion, advice, or direction thereon.

Additional or  
larger powers  
by settlement.

57.—(1.) Nothing in this Act shall preclude a settlor from conferring on the tenant for life, or the trustees of the settlement, any powers additional to or larger than those conferred by this Act.

(2.) Any additional or larger powers so conferred shall, as far as may be, notwithstanding anything in this Act, operate and be exercisable in the like manner, and with all the like incidents, effects and consequences, as if they were conferred by this Act, unless a contrary intention is expressed in the settlement.

### XIII.—LIMITED OWNERS GENERALLY.

Enumeration  
of other  
limited  
owners, to  
have powers of  
tenant for life.

58.—(1.) Each person as follows shall, when the estate or interest of each of them is in possession, have the powers of a tenant for life under this Act, as if each of them were a tenant for life as defined in this Act (namely):

(i.) A tenant in tail, including a tenant in tail who is by Act of Parliament restrained from barring or defeating his estate tail,

and although the reversion is in the Crown, and so that the exercise by him of his powers under this Act shall bind the crown, but not including such a tenant in tail where the land in respect whereof he is so restrained was purchased with money provided by Parliament in consideration of public services:

- (ii.) A tenant in fee simple, with an executory limitation, gift or disposition over, on failure of his issue, or in any other event:
- (iii.) A person entitled to a base fee, although the reversion is in the Crown, and so that the exercise by him of his powers under this Act shall bind the Crown:
- (iv.) A tenant for years determinable on life, not holding merely under a lease at a rent:
- (v.) A tenant for the life of another, not holding merely under a lease at a rent:
- (vi.) A tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of the estate, or by conditional limitation, or otherwise, or to be defeated by an executory limitation, gift, or disposition over, or is subject to a trust for accumulation of income for payment of debts or other purpose:
- (vii.) A tenant in tail after possibility of issue extinct:
- (viii.) A tenant by the curtesy:
- (ix.) A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not, or until sale of the land, or until forfeiture of his interest therein on bankruptcy or other event.

(2.) In every such case, the provisions of this Act referring to a tenant for life, either as conferring powers on him or otherwise, and to a settlement, and to settled land, shall extend to each of the persons aforesaid, and to the instrument under which his estate or interest arises, and to the land therein comprised.

(3.) In any such case any reference in this Act to death as regards a tenant for life shall, where necessary, be deemed to refer to the determination by death or otherwise of such estate or interest as last aforesaid.

#### XIV.—INFANTS; MARRIED WOMEN; LUNATICS.

59. Where a person, who is in his own right seised of or entitled in possession to land, is an infant, then for purposes of this Act the land is settled land, and the infant shall be deemed tenant for life thereof.

Infant absolutely entitled to be as tenant for life.

60. Where a tenant for life, or a person having the powers

Tenant for life, infant.

of a tenant for life under this Act, is an infant, or an infant would, if he were of full age, be a tenant for life, or have the powers of a tenant for life under this Act, the powers of a tenant for life under this Act may be exercised on his behalf by the trustees of the settlement, and if there are none, then by such person and in such manner as the Court, on the application of a testamentary or other guardian or next friend of the infant, either generally or in a particular instance, orders.

Married  
woman, how  
to be affected.

61.—(1.) The foregoing provisions of this Act do not apply in the case of a married woman.

(2.) Where a married woman who, if she had not been a married woman, would have been a tenant for life or would have had the powers of a tenant for life under the foregoing provisions of this Act, is entitled for her separate use, or is entitled under any statute, passed or to be passed, for her separate property, or as a feme sole, then she, without her husband, shall have the powers of a tenant for life under this Act.

(3.) Where she is entitled otherwise than as aforesaid, then she and her husband together shall have the powers of a tenant for life under this Act.

(4.) The provisions of this Act referring to a tenant for life and a settlement and settled land shall extend to the married woman without her husband, or to her and her husband together, as the case may require, and to the instrument under which her estate or interest arises, and to the land therein comprised.

(5.) The married woman may execute, make, and do all deeds, instruments, and things necessary or proper for giving effect to the provisions of this section.

(6.) A restraint on anticipation in the settlement shall not prevent the exercise by her of any power under this Act.

Tenant for  
life, lunatic.

62. Where a tenant for life, or a person having the powers of a tenant for life under this Act, is a lunatic, so found by inquisition, the committee of his estate may, in his name and on his behalf, under an order of the Lord Chancellor, or other person intrusted by virtue of the Queen's Sign Manual with the care and commitment of the custody of the persons and estates of lunatics, exercise the powers of a tenant for life under this Act; and the order may be made on the petition of any person interested in the settled land, or of the committee of the estate.

#### XV.—SETTLEMENT BY WAY OF TRUSTS FOR SALE.

Provision for  
case of trust  
to sell and  
re-invest in  
land.

63.—(1.) Any land, or any estate or interest in land, which under or by virtue of any deed, will or agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument or any number of instruments, whether made or passed before or

after, or partly before and partly after, the commencement of this Act, is subject to a trust or direction for sale of that land, estate, or interest, and for the application or disposal of the money to arise from the sale, or the income of that money, or the income of the land until sale, or any part of that money or income, for the benefit of any person for his life, or any other limited period, or for the benefit of two or more persons concurrently for any limited period, and whether absolutely, or subject to a trust for accumulation of income for payment of debts or other purpose, or to any other restriction, shall be deemed to be settled land, and the instrument or instruments under which the trust arises shall be deemed to be a settlement; and the person for the time being beneficially entitled to the income of the land, estate, or interest aforesaid until sale, whether absolutely or subject as aforesaid, shall be deemed to be tenant for life thereof; or if two or more persons are so entitled concurrently, then those persons shall be deemed to constitute together the tenant for life thereof; and the persons, if any, who are for the time being under the settlement trustees for sale of the settled land, or having power of consent to, or approval of, or control over the sale, or if under the settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purposes of this Act are for purposes of this Act trustees of the settlement.

(2.) In every such case the provisions of this Act referring to a tenant for life, and to a settlement, and to settled land, shall extend to the person or persons aforesaid, and to the instrument or instruments under which his or their estate or interest arises, and to the land therein comprised, subject and except as in this section provided (that is to say):

- (i.) Any reference in this Act to the predecessors or successors in title of the tenant for life, or to the remaindermen, or reversioners or other persons interested in the settled land, shall be deemed to refer to the persons interested in succession or otherwise in the money to arise from sale of the land, or the income of that money, or the income of the land, until sale (as the case may require).
- (ii.) Capital money arising under this Act from the settled land shall not be applied in the purchase of land unless such application is authorized by the settlement in the case of capital money arising thereunder from sales or other dispositions of the settled land, but may, in addition to any other mode of application authorized by this Act, be applied in any mode in which capital money arising under the settlement from any such sale or other disposition is applicable thereunder, subject

to any consent required or direction given by the settlement with respect to the application of trust money of the settlement.

(iii.) Capital money arising under this Act from the settled land and the securities in which the same is invested, shall not for any purpose of disposition, transmission, or devolution, be considered as land unless the same would, if arising under the settlement from a sale or disposition of the settled land, have been so considered, and the same shall be held in trust for and shall go to the same persons successively in the same manner, and for and on the same estates, interests, and trusts as the same would have gone and been held if arising under the settlement from a sale or disposition of the settled land, and the income of such capital money and securities shall be paid or applied accordingly.

(iv.) Land of whatever tenure acquired under this Act by purchase, or in exchange, or on partition, shall be conveyed to and vested in the trustees of the settlement, on the trusts, and subject to the powers and provisions which, under the settlement or by reason of the exercise of any power of appointment or charging therein contained, are subsisting with respect to the settled land, or would be so subsisting if the same had not been sold, or as near thereto as circumstances permit, but so as not to increase or multiply charges or powers of charging.

#### XVI.—REPEALS.

Repeal of  
enactments  
in schedule.

64.—(1.) The enactments described in the schedule to this Act are hereby repealed.

(2.) The repeal by this Act of any enactment shall not affect any right accrued or obligation incurred thereunder before the commencement of this Act; nor shall the same affect the validity or invalidity, or any operation, effect, or consequence, of any instrument executed or made, or of anything done or suffered, or of any order made, before the commencement of this Act; nor shall the same affect any action, proceeding, or thing then pending or uncompleted; and every such action, proceeding, and thing may be carried on and completed as if there had been no such repeal in this Act.

#### XVII.—IRELAND.

Modifications  
respecting  
Ireland.

65.—(1.) In the application of this Act to Ireland the foregoing provisions shall be modified as in this section provided.

(2.) The Court shall be Her Majesty's High Court of Justice in Ireland.

(3.) All matters within the jurisdiction of that Court shall, subject to the Acts regulating that Court, be assigned to the Chancery Division of that Court; but General Rules under this Act for Ire-

land may direct that those matters or any of them be assigned to the Land Judges of that Division.

(4.) Any deed inrolled under this Act shall be inrolled in the Record and Writ Office of that Division.

(5.) General Rules for purposes of this Act for Ireland shall be deemed Rules of Court within the Supreme Court of Judicature Act (Ireland), 1877, and may be made accordingly, at any time after the passing of this Act, to take effect on or after the commencement of this Act. 40 & 41 Vict. c. 57.

(6.) The several Civil Bill Courts in Ireland shall, in addition to the jurisdiction possessed by them independently of this Act, have and exercise the power and authority exercisable by the Court under this Act, in all proceedings where the property, the subject of the proceedings, does not exceed in capital value five hundred pounds, or in annual value thirty pounds.

(7.) The provisions of Part II. of the County Officers and Courts (Ireland) Act, 1877, relative to the equitable jurisdiction of the Civil Bill Courts, shall apply to the jurisdiction exercisable by those Courts under this Act. 40 & 41 Vict. c. 56.

(8.) Rules and Orders for purposes of this Act, as far as it relates to the Civil Bill Courts, may be made at any time after the passing of this Act, to take effect on or after the commencement of this Act, in manner prescribed by section seventy-nine of the County Officers and Courts (Ireland) Act, 1877.

(9.) The Commissioners of Public Works in Ireland shall be substituted for the Land Commissioners.

(10.) The term for which a lease other than a building or mining lease may be granted shall be not exceeding thirty-five years.

#### THE SCHEDULE.

Section 64.

##### REPEALS.

23 & 24 Vict. c. 145 . . . An Act to give to trustees, mortgagees, and others, certain powers now commonly inserted in settlements, mortgages and wills . . . . . } in part; namely,—  
in part.

##### Parts I. and IV.

(being so much of the Act as is not repealed by the Conveyancing and Law of Property Act, 1881).

27 & 28 Vict. c. 114 . . . The Improvement of Land Act, 1864 . . . . . in part; namely,—  
in part. Sections seventeen and eighteen:  
Section twenty-one, from “either by a party” to “benefice) or” (inclusive); and from “or if the land owner” to “minor or minors” (inclusive); and “or circumstance” (twice):  
Except as regards Scotland.

40 & 41 Vict. c. 18 . . . The Settled Estates Act, 1877 . . in part; namely,—  
in part. Section seventeen.



45 &amp; 46 VICT. C. 75.

## (MARRIED WOMEN'S PROPERTY ACT, 1882.)

*An Act to consolidate and amend the Acts relating to the Property of Married Women.* [18th August 1882.]

Married woman to be capable of holding property and of contracting as a feme sole

1.—(1.) A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a feme sole, without the intervention of any trustee.

(2.) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a feme sole, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise.

(3.) Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown.

(4.) Every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire.

(5.) Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a feme sole.

Property of a woman married after the Act to be held by her as a feme sole.

2. Every woman who marries after the commencement of this Act shall be entitled to have and to hold as her separate property and to dispose of in manner aforesaid all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation, in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill.

Loans by wife to husband.

3. Any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise, shall be treated as assets of her husband's

estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the amount or value of such money or other estate after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied.

4. The execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act. Execution of general power.

5. Every woman married before the commencement of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act, including any wages, earnings, money, and property so gained or acquired by her as aforesaid. Property acquired after the Act by a woman married before the Act to be held by her as a feme sole.

6. All deposits in any post office or other savings bank, or in any other bank, all annuities granted by the Commissioners for the Reduction of the National Debt or by any other person, and all sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England, or of any other bank, which at the commencement of this Act are standing in the sole name of a married woman, and all shares, stock, debentures, debenture stock, or other interests of or in any corporation, company, or public body, municipal, commercial, or otherwise, or of or in any industrial, provident, friendly, benefit, building, or loan society, which at the commencement of this Act are standing in her name, shall be deemed, unless and until the contrary be shown, to be the separate property of such married woman; and the fact that any such deposit, annuity, sum forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England or of any other bank, share, stock, debenture, debenture stock, or other interest as aforesaid, is standing in the sole name of a married woman, shall be sufficient *prima facie* evidence that she is beneficially entitled thereto for her separate use, so as to authorize and empower her to receive or transfer the same, and to receive the dividends, interest, and profits thereof, without the concurrence of her husband, and to indemnify the Postmaster General, the Commissioners for the Reduction of the National Debt, the Governor and Company of the Bank of England, the Governor and Company of the Bank of Ireland, and all directors, managers, and trustees of every such bank, corporation, company, public body, or society as aforesaid, in respect thereof. As to stock, &c. to which a married woman is entitled.

As to stock,  
&c. to be  
transferred,  
&c. to a  
married  
woman.

7. All sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Bank of England or of any other bank, and all such deposits and annuities respectively as are mentioned in the last preceding section, and all shares, stock, debentures, debenture stock, and other interests of or in any such corporation, company, public body, or society as aforesaid, which after the commencement of this Act shall be allotted to or placed, registered, or transferred in or into or made to stand in the sole name of any married woman shall be deemed, unless and until the contrary be shown, to be her separate property, in respect of which so far as any liability may be incident thereto her separate estate shall alone be liable, whether the same shall be so expressed in the document whereby her title to the same is created or certified, or in the books or register wherein her title is entered or recorded, or not.

Provided always, that nothing in this Act shall require or authorize any corporation or joint stock company to admit any married woman to be a holder of any shares or stock therein to which any liability may be incident, contrary to the provisions of any Act of Parliament, charter, byelaw, articles of association, or deed of settlement regulating such corporation or company.

Investments in  
joint names of  
married  
women and  
others.

8. All the provisions hereinbefore contained as to deposits in any post office or other savings bank, or in any other bank, annuities granted by the Commissioners for the Reduction of the National Debt or by any other person, sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Bank of England or of any other bank, shares, stock, debentures, debenture stock, or other interests of or in any such corporation, company, public body, or society as aforesaid respectively, which at the commencement of this Act shall be standing in the sole name of a married woman, or which, after that time, shall be allotted to, or placed, registered, or transferred to or into, or made to stand in, the sole name of a married woman, shall respectively extend and apply, so far as relates to the estate, right, title, or interest of the married woman, to any of the particulars aforesaid which, at the commencement of this Act, or at any time afterwards, shall be standing in, or shall be allotted to, placed, registered, or transferred to or into, or made to stand in, the name of any married woman jointly with any persons or person other than her husband.

As to stock,  
&c. standing  
in the joint  
names of a  
married  
man and

9. It shall not be necessary for the husband of any married woman, in respect of her interest, to join in the transfer of any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or

other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society as aforesaid, which is now or shall at any time hereafter be standing in the sole name of any married woman, or in the joint names of such married woman and any other person or persons not being her husband.

10. If any investment in any such deposit or annuity as aforesaid, or in any of the public stocks or funds, or in any other stocks or funds transferable as aforesaid, or in any share, stock, debenture, or debenture stock of any corporation, company, or public body, municipal, commercial, or otherwise, or in any share, debenture, benefit, right, or claim whatsoever in, to, or upon the funds of any industrial, provident, friendly, benefit, building, or loan society, shall have been made by a married woman by means of moneys of her husband, without his consent, the court may, upon an application under section seventeen of this Act, order such investment, and the dividends thereof, or any part thereof, to be transferred and paid respectively to the husband; and nothing in this Act contained shall give validity as against creditors of the husband to any gift, by a husband to his wife, of any property, which, after such gift, shall continue to be in the order and disposition or reputed ownership of the husband, or to any deposit or other investment of moneys of the husband made by or in the name of his wife in fraud of his creditors; but any moneys so deposited or invested may be followed as if this Act had not passed.

Fraudulent investments with money of husband.

11. A married woman may by virtue of the power of making contracts hereinbefore contained effect a policy upon her own life or the life of her husband for her separate use; and the same and all benefit thereof shall enure accordingly.

Moneys payable under policy of assurance not to form part of estate of the insured.

A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts: Provided, that if it shall be proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, they shall be entitled to receive, out of the moneys payable under the policy, a sum equal to the premiums so paid. The insured may by the policy, or by any memorandum under his or her hand, appoint a trustee or trustees of the moneys payable under the policy, and from time to time appoint a new trustee or new trustees thereof, and may make

13 & 14 Vict.  
c. 60.

Remedies of  
married  
woman for  
protection  
and security of  
separate  
property.

Wife's ante-  
nuptial debts  
and liabilities.

provision for the appointment of a new trustee or new trustees thereof, and for the investment of the moneys payable under any such policy. In default of any such appointment of a trustee, such policy, immediately on its being effected, shall vest in the insured and his or her legal personal representatives, in trust for the purposes aforesaid. If, at the time of the death of the insured, or at any time afterwards, there shall be no trustee, or it shall be expedient to appoint a new trustee or new trustees, a trustee or trustees or a new trustee or new trustees may be appointed by any Court having jurisdiction under the provisions of the Trustee Act, 1850, or the Acts amending and extending the same. The receipt of a trustee or trustees duly appointed, or, in default of any such appointment, or in default of notice to the insurance office, the receipt of the legal personal representative of the insured shall be a discharge to the office for the sum secured by the policy, or for the value thereof, in whole or in part.

12. Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a feme sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. In any indictment or other proceeding under this section it shall be sufficient to allege such property to be her property; and in any proceeding under this section a husband or wife shall be competent to give evidence against each other, any statute or rule of law to the contrary notwithstanding: Provided always, that no criminal proceeding shall be taken by any wife against her husband by virtue of this Act while they are living together, as to or concerning any property claimed by her, nor while they are living apart, as to or concerning any act done by the husband while they were living together, concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife.

13. A woman after her marriage shall continue to be liable in respect and to the extent of her separate property for all debts contracted, and all contracts entered into or wrongs committed by her before her marriage, including any sums for which she may be liable as a contributory, either before or after she has been placed on the list of contributories, under and by virtue of the Acts relating to joint stock companies; and she may be sued for any such debt and

for any liability in damages or otherwise under any such contract, or in respect of any such wrong; and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property; and, as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts, contracts or wrongs, and for all damages or costs recovered in respect thereof: Provided always, that nothing in this Act shall operate to increase or diminish the liability of any woman married before the commencement of this Act for any such debt, contract or wrong as aforesaid, except as to any separate property to which she may become entitled by virtue of this Act, and to which she would not have been entitled for her separate use under the Acts hereby repealed or otherwise, if this Act had not passed.

14. A husband shall be liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her, before marriage, including any liabilities to which she may be so subject under the Acts relating to joint stock companies as aforesaid, to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been bona fide recovered against him in any proceeding at law, in respect of any such debts, contracts, or wrongs for or in respect of which his wife was liable before her marriage as aforesaid; but he shall not be liable for the same any further or otherwise; and any Court in which a husband shall be sued for any such debt shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, or value of such property: Provided always, that nothing in this Act contained shall operate to increase or diminish the liability of any husband married before the commencement of this Act for or in respect of any such debt or other liability of his wife as aforesaid.

Husband to be liable for his wife's debts contracted before marriage to a certain extent.

15. A husband and wife may be jointly sued in respect of any such debt or other liability (whether by contract or for any wrong) contracted or incurred by the wife before marriage as aforesaid, if the plaintiff in the action shall seek to establish his claim, either wholly or in part, against both of them; and if in any such action or in any action brought in respect of any such debt or liability against the husband alone, it is not found that the husband is liable in respect of any property of the wife so acquired by him or to which he shall have become so entitled as aforesaid, he shall have judgment for his costs of defence, whatever may be the result of the

Suits for antenuptial liabilities.

action against the wife if jointly sued with him; and in any such action against husband and wife jointly, if it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband personally and against the wife as to her separate property; and as to the residue, if any, of such debt and damages, the judgment shall be a separate judgment against the wife as to her separate property only.

Act of wife  
liable to criminal  
proceedings.

16. A wife doing any act with respect to any property of her husband, which, if done by the husband with respect to property of the wife, would make the husband liable to criminal proceedings by the wife under this Act, shall in like manner be liable to criminal proceedings by her husband.

Questions  
between husband and wife  
as to property  
to be decided  
in a summary  
way.

17. In any question between husband and wife as to the title to or possession of property, either party, or any such bank, corporation, company, public body, or society as aforesaid in whose books any stocks, funds, or shares of either party are standing, may apply by summons or otherwise in a summary way to any judge of the High Court of Justice in England or in Ireland, according as such property is in England or Ireland, or (at the option of the applicant irrespectively of the value of the property in dispute) in England to the judge of the county court of the district, or in Ireland to the chairman of the civil bill court of the division in which either party resides, and the judge of the High Court of Justice or of the county court, or the chairman of the civil bill court (as the case may be) may make such order with respect to the property in dispute, and as to the costs of and consequent on the application as he thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the matters in question to be made in such manner as he shall think fit: Provided always, that any order of a judge of the High Court of Justice to be made under the provisions of this section shall be subject to appeal in the same way as an order made by the same judge in a suit pending or on an equitable plaint in the said court would be; and any order of a county or civil bill court under the provisions of this section shall be subject to appeal in the same way as any other order made by the same court would be, and all proceedings in a county court or civil bill court under this section in which, by reason of the value of the property in dispute, such court would not have had jurisdiction if this Act or the Married Women's Property Act, 1870, had not passed, may, at the option of the defendant or respondent to such proceedings, be removed as of right into the High Court of Justice in England or Ireland (as the case may be), by writ of certiorari or otherwise as may be

prescribed by any rule of such High Court; but any order made or act done in the course of such proceedings prior to such removal shall be valid, unless order shall be made to the contrary by such High Court: Provided also, that the judge of the High Court of Justice or of the county court, or the chairman of the civil bill court, if either party so require, may hear any such application in his private room: Provided also, that any such bank, corporation, company, public body, or society as aforesaid, shall, in the matter of any such application for the purposes of costs or otherwise, be treated as a stakeholder only.

18. A married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person, or a trustee alone or jointly as aforesaid of property subject to any trust, may sue or be sued, and may transfer or join in transferring any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society in that character, without her husband, as if she were a feme sole.

Married woman as an executrix or trustee.

19. Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman, or shall interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument; but no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors.

Saving of existing settlements, and the power to make future settlements.

20. Where in England the husband of any woman having separate property becomes chargeable to any union or parish, the justices having jurisdiction in such union or parish may, in petty sessions assembled, upon application of the guardians of the poor, issue a summons against the wife, and make and enforce such order against her for the maintenance of her husband out of such separate property as by the thirty-third section of the Poor Law Amendment Act, 1868, they may now make and enforce against a husband

Married woman to be liable to the parish for the maintenance of her husband.

31 & 32 Vict. c. 122.



for the maintenance of his wife if she becomes chargeable to any union or parish. Where in Ireland relief is given under the provisions of the Acts relating to the relief of the destitute poor to the husband of any woman having separate property, the cost price of such relief is hereby declared to be a loan from the guardians of the union in which the same shall be given, and shall be recoverable from such woman as if she were a feme sole by the same actions and proceedings as money lent.

Married woman to be liable to the parish for the maintenance of her children.

21. A married woman having separate property shall be subject to all such liability for the maintenance of her children and grandchildren as the husband is now by law subject to for the maintenance of her children and grandchildren: Provided always, that nothing in this Act shall relieve her husband from any liability imposed upon him by law to maintain her children or grandchildren.

Repeal of 33 & 34 Vict. c. 93. 37 & 38 Vict. c. 50.

22. The Married Women's Property Act, 1870, and the Married Women's Property Act, 1870, Amendment Act, 1874, are hereby repealed: Provided that such repeal shall not affect any act done or right acquired while either of such Acts was in force, or any right or liability of any husband or wife, married before the commencement of this Act, to sue or be sued under the provisions of the said repealed Acts or either of them, for or in respect of any debt, contract, wrong, or other matter or thing whatsoever, for or in respect of which any such right or liability shall have accrued to or against such husband or wife before the commencement of this Act.

Legal representative of married woman.

23. For the purposes of this Act the legal personal representative of any married woman shall in respect of her separate estate have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living.

Interpretation of terms.

24. The word "contract" in this Act shall include the acceptance of any trust, or of the office of executrix or administratrix, and the provisions of this Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or devastavit committed by any married woman being a trustee or executrix or administratrix either before or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration. The word "property" in this Act includes a thing in action.

Commencement of Act.

25. The date of the commencement of this Act shall be the first of January one thousand eight hundred and eighty-three.

Extent of Act. Short title.

26. This Act shall not extend to Scotland.

27. This Act may be cited as the Married Women's Property Act, 1882.

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